Supreme Court, U.S.
FILED
JAN 5 - 2004
OFFICE OF THE CLERK

No. 03-978

IN THE

Supreme Court of the United States

MICHAEL J. EDMONDSON,

Petitioner,

v.

SHEARER LUMBER PRODUCTS, a division of BENNETT LUMBER PRODUCTS, INC., an Idaho corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the action of the state court granting, under the state common law "at-will" rule, a private sector employer the right to terminate it's employee because of the employee's exercise of the his Constitutional right of free speech and assembly by attending a public meeting on a public issue constitutes state action of the nature prohibited by the Fourteenth Amendment?

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Petitioner Michael J. Edmondson (Edmondson) requests this Court to issue a Writ Of Certiorari to review the opinion of the Idaho Supreme Court filed July 23, 2003.

OPINIONS BELOW

The opinion of the Idaho County District Court (Appendix B hereto) as well as its Order Denying Reconsideration (Appendix C hereto) are unreported. The opinion of the Idaho Supreme Court on the merits (Appendix A hereto) is reported at __ Idaho __, 75 P.3d 733, (2003 Op. No. 90). The Idaho Supreme Court's Order Denying Petition For Rehearing (Appendix D hereto) is unreported.

STATEMENT OF JURISDICTION

The decision of the Idaho Supreme Court was filed on July 23, 2003 (Appendix A hereto). A timely petition for rehearing was denied on September 4, 2003, and Justice Sandra Day O'Connor granted Edmondson's extension of time to file this petition until January 3, 2004.

This Court has jurisdiction of this case under 28 U.S.C. § 1257(a) and Supreme Court Rule 10(c) in that the Idaho Supreme Court has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

CONSTITUTIONAL PROVISIONS AND THE COMMON-LAW RULE INVOLVED

1. Constitution of the United States, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. Constitution of the United States, Amendment 14:

> § 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a state in which a final decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or

claimed under the Constitution or the treaties or statute of, or any commission held or authority exercised under, the United States.

4. Idaho's Common Law "at-will"employment rule:

> A private sector employee can be terminated by his employer at any time for any reason unless the motivation for the termination contravenes public policy. An employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the constitutional rights of the free speech and assembly because doing so does not contravene Idaho public policy.

STATEMENT OF THE CASE

The essence of this case is the Idaho Supreme Court's granting a private sector employer the right to fire it's employee, under Idaho's common law "at-will" employment rule, for attending public meetings at which proposals for management of federal lands in the State of Idaho were the topic of discussion. These meetings were held as a result of the Idaho State Land Board's Federal Lands Task Force seeking citizen participation and input on various land management proposals.

Michael J. Edmondson (Edmondson) was employed by Shearer Lumber Products (Shearer Lumber) continuously for twenty-two years. His most recent job performance review, performed by his mill manager, awarded him a performance rating of "very good." It was well known by Shearer Lumber

that Edmondson was extensively involved in community activities and regularly attended public meetings concerning matters of public interest and concern. Shearer Lumber even gave Edmondson time off from work to attend citizen leadership workshops. Edmondson was awarded the Idaho GEM Citizen Award by then Governor Batt for his community minded involvement and activity.

Edmondson attended two public meetings organized by a group known as Save Elk City. At these meetings the group sought to obtain public support for a proposal it had submitted to the State of Idaho Land Board's Federal Lands Task Force. Public Notice of these meetings was posted with one notice placed on Shearer Lumber's bulletin board. At the meetings, Edmondson made no specific comments on the group's activities or proposal nor did he discuss any of his own opinions at work with co-employees. Shearer Lumber knew that Edmondson had attended the meetings. Shearer Lumber management, at a closed door meeting with Edmondson, made it clear that he was not to form any opinions or make any statements to the Federal Lands Task Force. Edmondson was told by Shearer Lumber management that it had secretly paid for the Save Elk City proposal discussed at the meetings so that it would be submitted to the Federal Lands Task Force. He was told all employees would support the projects the mill was involved in or face serious consequences. Five days after the second meeting, Shearer Lumber's general manager ordered the local mill manager to fire Edmondson. He was told to do so by reading the following statement: "Because of your continued involvement in activities that are harmful to the long term interests of Shearer Lumber Products, we are terminating your employment immediately." The mill manager, who had just recently evaluated Edmondson's work as "very good", testified that he had no idea why he was told

to fire him. He just followed his orders. He did not learn that the reason that Edmondson had been fired was for attending the Save Elk City meetings until several months later.

The issue that whether First Amendment rights of free speech and assembly are Idaho public policy exceptions to the Idaho common-law "at-will" rule was decided in the negative by the Idaho Supreme Court. Edmondson's Petition for Rehearing before the court raised the issue of the Idaho Supreme Court's decision constituting prohibited "state action" under the Fourteenth Amendment. (Appendix E) The Petition for Rehearing was denied without comment. (Appendix D)

REASONS FOR GRANTING THE PETITION

Allowing employers to terminate employees based on the employee's after hours and away from work association and speech on public issues important to the community invites employers to squelch the association, speech and debate so inherently necessary to our system of government. J. Kidwell, in his dissent below, correctly noted this degradation of our system of government is particularly insidious when viewed in the context of the myriad of small communities across our nation with only one or maybe two economically prominent employers. Under such circumstances the governance of our country is no longer one of law, nor even man, but rather corporate economic interests enforced by heavy handed control over all aspects of employees' lives, fortune, and liberty. The ideological battle for control of the minds and thoughts of our country doesn't always begin in the metropolitan areas but rather often in our small communities and lesser populated states

across our country.[1] As *The Idaho Statesman*, Idaho's largest daily newspaper published in the state's capitol of Boise, exclaimed:

> Our View: Supreme Court speaks: Shut up and get to work. . . . Being an at-will employee should not mean that a person has to give up basic individual rights. . . . If the Court does not uphold the right to free assembly, then everything else is fair game — including freedom of religion. Under this ruling an at-will employee conceivably could be fired for attending something as innocent as a Fourth of July parade or being involved with the wrong political party.

(Appendix F)

Forbes magazine's Dan Seligman, in an article discussing this case and the "at-will" rule,[2] acknowledged that: "Many folks are shocked to discover that the U.S. still has laws allowing employers to fire workers arbitrarily." Every United States citizen should be shocked when this arbitrariness takes away their most fundamental rights, of free speech and assembly, from which all of our other fundamental rights are born and protected. While a good economy is important to our country, no danger to any industrial concern is so serious as to justify sweeping proscriptions of free speech and association enforced by any court's order. *Thornhill v. State of Alabama*, 310 U.S. 88 (1940)

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1. *See Big Trouble*, J. Anthony Lukas.

2. *See Forbes*, Companies, People, Ideas, Dan Seligman.11.10.03.

I. Certiorari Is Warranted To Review The Idaho Supreme Court's Holding That The Common Law Rule Of "At-Will" Employment Permits A Private Sector Employer To Terminate An Employee Because Of The Employee's Exercise Of His Constitutional Rights Of Free Speech And Assembly On His Own Time And Away From The Worksite.

There is an irreconcilable split between federal courts' application of the First Amendment's guarantees of free speech and free association to private sector employers' power to fire employees under the common law "at-will" doctrine and the endorsement of literally all state courts decisions, state action under the Fourteenth Amendment, empowering private sector employers the right to fire employees for the sole reason of their exercising their constitutional right to free speech and assembly by attending public meetings on issues of public importance. State action of this oppressive nature eliminates the fundamental liberty of the common man to exercise free speech and free association. These state courts' decisions on "at-will" effectively evade federal court review because of the practical and inherent governance of the private sector employer-employee employment relationship under state common law.

The only federal case found to be on point *Novosel Nationwide Ins. Co.*, 721 F.2d 894, 900 (3d Cir. 1983) in a strongly worded opinion held that an important public policy is implicated when a private employer attempts to coerce its employees activities and associations. The Idaho court discarded *Novosel* and relied upon other state court decisions that have supported corporate entities concerted program of punishing free speech and assembly with termination by placing common law above constitutional law. *See Tiernan*

v. Charleston Area Medical Center, Inc., 506 S.E.2d 578, 589-90 (W. Va. 1998) State courts of last resort in these cases have refused to recognize that their actions constitute state action of the nature subject to prohibition by the Fourteenth Amendment. *See American Federation of Labor v. Swing*, 312 U.S. 321 (1941); *Commonwealth of Virginia v. Rives*, 100 U.S. 313, 318 (1880); and *Shelley v. Kraemer*, 334 U.S. 1 (1948)

II. The Decision Of The Court Below That The First Amendment Does Not Apply To Restrictions Imposed By Private Parties And Sought To Be Enforced By One Party Through The State's Court's Authority Directly Conflicts With This Court's Precedents.

1. *Shelley v. Kraemer.* The Idaho Supreme Court decision below in this case held that "the First Amendment . . . do(es) not apply to alleged restrictions imposed by private parties. . . ." This assertion is in startling contrast to this Court's decision in *Shelley v. Kraemer*, *supra*, where this Court emphasized that the Fourteenth Amendment is not ineffective nor inapplicable merely because the action that the State has enforced was defined initially the terms of a private agreement. The Idaho Court in support of its holding referred "generally" to this Court's decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and ignored this Court's long line of precedents overturning state court decisions as state action. *Roberts* opened the doors of free association while the Idaho court's decision below, with the full power and authority of the State of Idaho enforcement of its common law, utilized *Roberts* as grounds to slam the doors leading to free speech and association by common citizens closed.

This Court's decision in *Shelley v. Kraemer* is irreconcilable with the Idaho Court's decision. This Court specifically emphasized that the action of state courts in enforcement of a substantive common-law rule formulated by those courts, may result in the denial of the rights guaranteed by the Fourteenth Amendment. In this case it was precisely the lower court's adoption of an unyielding interpretation of Idaho's common-law "at-will" employment rule that, in a breathtaking all encompassing manner, took away the ability of every private sector employee to exercise freedom of speech and assembly away from their place of work on all local, state, or national issues. Review of the oral argument before the Idaho Court reveals that the breadth this decision, through questioning by a member of the majority below, shockingly supports the right of any private sector employer to fire an at-will employee, not only for the exercise of free speech and assembly, but also, because of an employee's choice to marry a person of a different race or color.

The Idaho Court's decision turns the back of state government on most personal rights under the guise of a common law rule on employment. In the context of the oral argument discussed above the lower court's decision in a sweeping manner goes so far as to disregard the entire historical context of the Fourteenth Amendment of establishing equality in the enjoyment of basic civil and political rights.

2. *American Federation of Labor v. Swing*, 312 U.S. 321 (1941). This Court held that enforcement by a state court of a common law policy of a state prohibiting peaceful persuasion through picketing violated the constitutional guarantee of

freedom of discussion. Like *American Federation* this case presents a substantial claim of the right to free discussion and assembly. Such an ability to ban free communication and assembly as awarded private sector employers by the court below directly impacts the vast majority of citizens of our country employed by private sector employers. This Court has frequently indicated that First Amendment rights are to be guarded with a jealous eye. This lower court's decision cannot stand up to such scrutiny.

It is an irony amounting to grave injustice that the state court would uphold the firing of a private entity employee for the reason of his attending a public meeting addressing a proposal to the State of Idaho Land Board's Federal Lands Task Force whose principal task was to generate public proposals and public input into the use and management of federal lands in the State of Idaho.

3. *Thornhill v. State of Alabama*, 310 U.S. 58 (1940). This Court in *Thornhill* affirmed that freedom of speech secured by the First Amendment is among the fundamental personal rights and liberties secured to all persons by the Fourteenth Amendment against abridgement by a state. A state acts through different agencies such as its judiciary. *Virginia v. Rives*, 100 U.S. 313 (1879).

When the effective exercise of free speech and assembly are claimed to be abridged the courts should weigh the circumstances and appraise the substantiability of the reasons advanced in support of the challenged action. *Schneider v. State*, 308 U.S. 147 (1939).

Such an evaluation is straight forward in this case. The circumstances are that: (1) Edmondson attended a public

meeting after notice of it was posted on his employer's bulletin board; (2) Edmondson made no comments at the public meeting relative to the issue of federal forest management discussed at the meeting nor did he discuss the issue with fellow employees; and (3) Edmondson was told by Shearer Lumber management in a closed door meeting that he was not to form any opinions on or make statements to the Federal Lands Task Force. The circumstances and substantiability of Edmondson's firing, upheld by the Idaho Supreme Court were that Edmondson exercised his rights of free speech and assembly by attending a publicly noticed meeting on a public issue of federal lands management, that was not held during work time and was away from the work site.

As reflected by the split between the *Novosel* federal court and the various state court decisions the application of a common-law "at-will" employment rule to circumvent the common man's First Amendment rights is not a matter of mere local or private concern.

It is true that the rights of employers and employees to conduct their relationship are subject to the interest of society and thus the continuation of the general "at-will" rule is not at risk. This common law rule however may not be used by the private sector employers, with the seal of approval of state courts, to impair individual employees' right to freely discuss, and attend, open and public meetings on matters that are of public concern. The Idaho Court's enforcement of Shearer Lumber's termination of Edmondson could, as reflected by the colloquy in oral argument below, be used as precedent to abridge freedom of speech and assembly as well as literally every other matter of importance to our form of government that flows from the First and Fourteenth Amendments.

CONCLUSION

It is essential that certiorari be granted now. Nothing will occur to change this eviscerment of First Amendment rights of the vast majority of private sector employees across our nation unless this Court reviews this case. Indeed the severity of this far-reaching issue is shown by the fact that the federal court in *Novosel* cited Idaho's original "at-will" decision, *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977), as authority for its decision protecting private employees' free speech rights. Idaho which once held the torch of freedom, has by its decision doused it in favor of heavy handed private sector economic coercion.

This is not a close case. Whatever the exact scope of the common-law "at-will" employment rule may be it cannot be permitted to be interpreted as allowing private sector employers, as a condition of continued employment, to require that its employees form no opinions on, make no statements on, and attend no public meetings on, issues of public interest and discussion.

Therefore Petitioner Edmondson respectfully prays that this Court grant this petition for Writ of Certiorari, reverse the decision of the Idaho Supreme Court, and hold that an employee has a cause of action against a private sector employer who terminates the employee because of the employee's exercise of the employee's constitutional right to free speech and assembly by attending a public meeting on his own time away from the worksite.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF IDAHO DATED AND FILED JULY 23, 2003

IN THE SUPREME COURT OF THE STATE OF IDAHO
DOCKET NO. 28541

Boise, April 2003 Term

MICHAEL J. EDMONDSON,

Plaintiff-Appellant,

v.

SHEARER LUMBER PRODUCTS, a division of BENNETT LUMBER PRODUCTS, INC., an Idaho corporation,

Defendant-Respondent.

2003 Opinion No. 90

Filed: July 23, 2003

Frederick C. Lyon, Clerk

WALTERS, Justice

This is a wrongful termination of employment case. The employee appeals from the district court's dismissal of the action upon the employer's motion for summary judgment. We affirm.

Appendix A

FACTS

Michael Edmondson was employed by Shearer Lumber Products for twenty-two years at the company's Elk City mill. In 1999, he became a salaried employee and on his most recent performance review, he received a rating of "very good." However, on February 15, 2000, the plant manager, David Paisley, following directions from his superiors fired Edmondson, by reading a statement that informed Edmondson: "Because of your continued involvement in activities that are harmful to the long term interests of Shearer Lumber Products, we are terminating your employment immediately."

It was well known at Shearer Lumber that Edmondson was extensively involved in the community and regularly attended public meetings concerning matters of public interest and concern, such that he was recognized with the Idaho GEM Citizen Award by then Governor Batt. In January of 2000, Edmondson attended a public meeting of a group known as Save Elk City. One of the leaders of the group was the resource manager at Shearer Lumber, Dick Wilhite, who at the group meetings encouraged public support for the proposal that Save Elk City had submitted to the Federal Lands Task Force Working Group for consideration as to how best to manage the Nez Perce National Forest. Edmondson attended the group meetings, but he made no comments on the group's proposal. Nor did he discuss his opinions regarding the Save Elk City proposal at work with other employees.

Appendix A

Shearer Lumber did not openly campaign for the Save Elk City proposal, but Edmondson later learned from Wilhite that the proposal submitted in the name of Save Elk City was the project of Shearer Lumber's owner, Dick Bennett. At that time, Wilhite and Edmondson discussed the various outstanding proposals that might be competing for the Task Force's recommendation to the State Land Board, but Edmondson did not declare a preference for any of the proposals.

Shearer Lumber obtained information that Edmondson had attended meetings of the Task Force, had contacted someone in the administration of the Task Force, and was opposed to the collaborative project that Shearer had sponsored and submitted on behalf of the Save Elk City group. Edmondson was twice called into meetings at Shearer Lumber, where he claimed he was subjected to intimidation and pressure from Wilhite, Paisley, and John Bennett, Shearer's general manager. It was made clear that Edmondson was *not* to form any opinions on or make any statements to the Federal Lands Task Force. In effect, Edmondson was warned that any opposition to the collaborative project that was contrary to Shearer's interest would lead to serious consequences. Edmondson was informed at the February 2, 2000, meeting that Shearer Lumber wanted all of its employees to support the projects the mill was involved in, if they wanted to avoid serious consequences that would result if the project was derailed or negatively impacted.

John Bennett testified in his deposition that the reason Edmondson was terminated was that Edmondson was opposing the project that Shearer Lumber Products supported,

in direct conflict with the company's goals that could ultimately jeopardize a Task Force decision favorable to Shearer's interests. Bennett also attributed to Edmondson contact with the Task Force administration, although it was Edmondson's wife, Jamie, who had made inquiries to the Task Force. Edmondson speculated further as to the reason for his termination, which occurred the day after federal agents impounded some logs stored on the Shearer Mill site, as part of a U.S. Forest Service investigation in which Jamie Edmondson had also played a role. However, John Bennett testified that the logs belonged to a third party, and Shearer had no interest in how the logs were handled.

PROCEDURAL HISTORY

Edmondson brought an action against Shearer Lumber for wrongful termination of employment and demanded a jury trial. Edmondson moved for partial summary judgment on the claim of termination of employment, asserting breach of the public policy exception to the employment-at-will doctrine. Shearer Lumber moved for summary judgment, claiming that Edmondson, who was at all times material to the complaint an employee-at-will, had no legally cognizable claim regarding his termination.

On August 2, 2001, the district court heard the cross-motions for summary judgment, along with Edmondson's motion to amend the complaint. The district court awarded summary judgment to Shearer, holding that Edmondson's allegations did not fall within the limited public policy exception recognized in Idaho. The district court denied Edmondson's motion to amend the pleadings and denied

Edmondson's motion to reconsider its summary judgment decision. This appeal followed.

STANDARD OF REVIEW

Summary judgment is only appropriate when genuine issues of material fact are absent and the case can be decided as a matter of law. I.R.C.P. 56(c); *Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 2918, 302, 647 P.2d 754, 758 (1982). In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

DISCUSSION

I.

Edmondson argues that summary judgment was improperly granted because issues of material fact exist that must be resolved by a jury, such as which meetings he attended, which proposal he endorsed, and which of his actions constituted the "continued involvement in activities harmful to the long term interests of Shearer." No dispute of fact is "material," however, unless it relates to an issue that is disclosed by the pleadings. *Harms Memorial Hospital v.*

Morton, 112 Idaho 129, 730 P.2d 1049 (Ct. App. 1986), *citing Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct. App. 1984). The tendered factual issues as to the reasons for Edmondson's discharge are not material to Edmondson's claims because, as the district court held, Edmondson was an at-will employee, who could be terminated by his employer at any time for any reason without creating liability. *See Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d 744 (1989); *MacNeil v. Minidoka Memorial Hospital*, 108 Idaho 588, 701 P.2d 208 (1985). The alleged factual issues concerning the circumstances of the firing, if they establish that Edmondson has asserted a policy exception to the at-will doctrine, are questions of law. *See Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997). Thus, we freely review whether the record shows, without a genuine dispute of fact, that the public policy asserted by Edmondson is appropriate as a public policy exception to the employment at-will doctrine.

A. The district court did not err in granting summary judgment on the claim of breach of public policy exception to the at-will doctrine.

In Idaho, the only general exception to the employment at-will doctrine is that an employer may be liable for wrongful discharge when the motivation for discharge contravenes public policy. *MacNeil v. Minidoka Memorial Hosp.*, supra; *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Anderson v. Farm Bureau Mut. Ins. Co. of Idaho*, 112 Idaho 461, 469, 732 P.2d 699, 707 (Ct. App. 1987). The purpose of the exception is to balance the competing interests of society, the employer, and the employee in light of modern

business experience. *Crea v. FMC Corp.*, 135 Idaho 175, 178, 16 P.3d 272, 375 (2000). The public policy exception has been held to protect employees who refuse to commit unlawful acts, who perform important public obligations, or who exercise certain legal rights or privileges. *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 668, 799 P.2d 70, 74 (1990). Public policy of the state is found in the constitution and statutes. *Boise-Payette Lumber Co. v. Challis Independent School Distr. No. 1*, 46 Idaho 403, 268 P. 26 (1928). "In the absence of case law or statutory language . . . , the Court finds no basis for expanding the Idaho law that defines the public policy exception to the at-will doctrine." *Lord v. Swire Pacific Holdings, Inc.*, 203 F.Supp.2d 1175, 1180 (D.Idaho 2002).

Courts have recognized that public policy expressed in the constitution and the statutes of the state may serve as a basis for finding an exception to the employment at-will doctrine. *See generally* 82 Am.Jur.2d *Wrongful Discharge* § 19, at 692 (1992). The First Amendment prohibits the government from restraining or abridging freedom of speech and assembly. Article I, § 9 of the Idaho Constitution also guarantees the right of free speech: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." Article I, § 10 of the Idaho Constitution guarantees the right of freedom of association: "The people shall have the right to assemble in a peaceful manner, to consult for their common good; to instruct their representatives, and to petition the legislature for the redress of grievances." The First Amendment and Article I, §§ 9 and 10 of the Idaho Constitution do not apply to alleged restrictions imposed by private parties, however. *See generally Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

Appendix A

Edmondson maintains that he was wrongfully terminated because he exercised his constitutionally protected rights of free speech and association. He argues that the public policy at issue prohibits restrictions on free speech and association. He relies on *Gardner v. Evans*, 110 Idaho 925, 719 P.2d 1185 (1986) and *Lubcke v. Boise City/Ada County Housing Authority*, 124 Idaho 450, 860 P.2d 653 (1993), which followed the two-step analysis of *Connick v. Myers*, 461 U.S. 138 (1983), in determining initially whether the speech involves a matter of public concern and, if so, applying a balancing test. These cases, however, all deal with governmental restrictions on free speech and associative rights of employees of public agencies, which are inapplicable in the private employment context in which Edmondson worked. The prevailing view among those courts addressing the issue in the private sector is that state or federal constitutional free speech cannot, in the absence of state action, be the basis of a public policy exception in wrongful discharge claims. See *Tiernan v. Charleston Area Medical Center, Inc.*, 506 S.E.2d 578, 589-90 (W.Va. 1998), and cases cited therein.

Edmondson argues that I.C. § 18-7901[1] expresses a public policy extending constitutional free speech protection to relationships between private employers and its employees.

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1. I.C. § 18-7901 provides as follows;

> The legislature finds and declares that it is the right of every person regardless of race, color, ancestry, religion or national origin, to be secure and protected from fear, intimidation, harassment, and physical harm caused by the activities of groups and individuals.

The district court did not make a finding specifically addressing I.C. § 18-7901, but even if it had, the facts alleged by Edmondson regarding his termination fall far short of describing conduct that was harassing, intimidating or threatening and based upon the descriptive list set forth in the statute.[2]

Finally, Edmondson urges that public policy is implicated wherever the power to hire and fire is utilized to dictate the terms of an employee's political activities and associations, relying on *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 900 (3rd Cir.1983). There the court held that an important public policy was at stake and that Novosel's allegations that the employer coerced political activity stated a wrongful discharge claim. *Id.* However, the public policy adopted in *Novosel* has not been endorsed by any other court, not even the Pennsylvania state courts within the federal district of the Circuit that issued *Novosel.* We likewise decline to extend Idaho's public policy exception through the adoption of *Novošel.*

Accordingly, we hold that an employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee's constitutional right of free speech. The district court's dismissal of the claim of breach of public policy exception to the at- will doctrine is affirmed.

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2. We do not suggest that the legislature's descriptive list should be deemed to exclude other well-recognized protected classes such as age, gender, or persons with mental or physical disabilities.

B. The district court properly rejected the claim for termination in violation of public policy based on Edmondson's wife's involvement in a federal investigation related to the impoundment of logs on Shearer's mill site.

Edmondson asserted that his discharge was implicitly motivated by his wife's involvement with logs that were impounded by federal authorities the day before he was terminated. Edmondson produced testimony presented by his wife in her own unemployment compensation proceeding following her voluntary termination of employment with Shearer, showing that she had spoken with a U.S. Forest Service investigator about logs located on Shearer Lumber's property that purportedly belonged to a third party. Although Shearer at first claimed a lien upon the logs for storage, and then withdrew its claim of lien, there was no allegation or evidence of wrongdoing by Shearer. Edmondson contends that these facts are sufficient to raise a genuine issue for trial on his complaint for wrongful discharge in violation of public policy against retaliation for his wife's conduct.

We disagree. Even if a cause of action for damages should exist as relief for alleged retaliatory discharge in contravention of public policy based upon conduct of the employee's spouse, *see e.g.*, *Bammert v. Don's Super Valu, Inc.*, 646 N.W.2d 365, 370 (2002),[3] the dearth of evidence in this case fails to present facts showing either that Shearer committed any wrongful act with regard to the logs or that there was any causal connection between Edmondson's wife's contact with the investigator and Shearer's decision to

3. We expressly decline to fully decide this issue at this time.

discharge Edmondson from its employment. The district court did not err in rejecting Edmondson's claim of retaliatory discharge.

II.

The district court properly refused to address the breach of implied-in-fact limitations to the at-will relationship on summary judgment.

The district court noted that neither of the two claims in Edmondson's complaint asserted a breach of any alleged implied-in-fact limitations to the at-will employment relationship. In ruling on the summary judgment motion, therefore, the district court determined not to address the claim.

Edmondson alleges that limitations on Shearer Lumber's right to terminate him could be found (a) in a letter sent by Shearer Lumber to him after his firing, which discussed vacation pay that was due him as a salaried employee, and (b) by virtue of Edmondson's subjective understanding that Shearer Lumber could only terminate salaried employees like him with certain limitations and for just cause. Edmondson contends that a genuine issue of material fact exists as to whether there was any reasonable communication to him of an unlimited at- will status. More importantly, Edmondson admits that he failed to assert the claim in his complaint, but he argues that he was not barred from asserting additional claims in response to the defendant's motion for summary judgment.

The authority upon which Edmondson relies, *Bluestone v. Mathewson*, 103 Idaho 453, 649 P.2d 1209 (1982), and *Callenders, Inc. v. Beckman*, 120 Idaho 169, 814 P.2d 429 (Ct. App. 1991), speaks to when an affirmative defense may properly be raised and thus provides no basis for a different result on this issue. A cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal. *See Beco Const. v. City of Idaho Falls*, 124 Idaho 859, 865, 865 P.2d 950, 956 (1993). Accordingly, the district court correctly declined to rule on the implied-in-fact claim at the summary judgment stage.

III.

The district court did not err in denying Edmondson's motion to amend.

Following the decision of the district court on summary judgment, Edmondson filed a motion to amend his complaint to assert a breach of contract claim and a breach of the covenant of good faith and fair dealing. The district court denied the motion after a hearing, holding that the record did not support a claim for breach of an implied-in-fact contract. The district court also held that the record failed to show that the at-will relationship was somehow modified or did not apply to Edmondson.

The decision to grant or refuse permission to amend is left to the sound discretion of the trial court where a party proposes to amend its complaint when the record contains no allegation, which, if proven, would entitle the party to

the relief claimed. *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997). A limitation of an at-will employment will be implied when, from all the circumstances surrounding the relationship, a reasonable person could conclude that both parties intended that either's party's right to terminate the relationship was limited by the implied-in-fact agreement. *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 712, 874 P.2d 520, 523 (1994). A plaintiff's subjective understanding is insufficient to establish an express or implied agreement limiting at-will employment. *Arnold v. Diet Center, Inc.*, 113 Idaho 581, 746 P.2d 1040 (Ct. App. 1987). Edmondson's personal belief that the company would not terminate him for attending public meetings, which the company allowed him to attend, or, would not terminate him without good cause, does not create limitations on Shearer's right to terminate him at will.

Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons why an employee may be discharged, the employee is at-will and can be terminated for any reason or no reason at all. *Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 61 P.3d 557 (2002); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977). Furthermore, as the district court ruled, the employee handbook expressly defined the relationship as at-will and negates Edmondson's claim of intent to restrict the grounds for discharge. *See Moser v. Coca-Cola Northwest Bottling Co.*, 129 Idaho 709, 931 P.2d 1227 (Ct. App. 1997). As a matter of law, therefore, the plaintiff failed to show that an implied contract changed the employee's at-will status. *Raedlein v. Boise Cascade Corp.*, 129 Idaho 627, 630, 931 P.2d 621, 624 (1996). The district

court also held that the covenant of good faith and fair dealing does not prohibit an employer from terminating an employee at-will. We agree. *See Farnworth v. Femling*, 125 Idaho 283, 288, 869 P.2d 1378, 1384 (1994), *citing Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 627, 778 P.2d 744, 749 (1989). We find no error in the district court's decision denying the Edmondson's motion to amend.

IV.

The district court did not err in dismissing Edmondson's claim of intentional infliction of emotional distress.

In Idaho, four elements are necessary to establish a claim of intentional infliction of emotional distress: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe. *Curtis v. Firth*, 123 Idaho 598, 601, 850 P.2d 749, 751 (1993). Justification for an award of damages for emotional distress seems to lie not in whether distress was actually suffered by a plaintiff, but rather the quantum of outrageousness of the defendant's conduct. *Brown v. Fritz*, 108 Idaho 357, 362, 699 P.2d 1371, 1376 (1985). "Although a plaintiff may in fact have suffered extreme emotional distress . . . no damages are awarded in the absence of extreme and outrageous conduct by a defendant." *Id.* Courts have required very extreme conduct before awarding damages for the intentional infliction of emotional distress. *See Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 100, 625 P.2d 1098, 1103 (1981).

Appendix A

Summary judgment is proper when the facts allege conduct of the defendant that could not reasonably be regarded as so extreme and outrageous as to permit recovery for intentional or reckless infliction of emotional distress.

> It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Restatement (Second) of Torts, § 46 comment h (1965).

The facts before the court were that Edmondson, a twenty-two-year employee with an excellent work record, was taken to his office and to his locker to collect his belongings and then escorted off the premises. Edmondson argues that Shearer's conduct was an abuse of its power as the employer,[4] and that its knowledge of Edmondson's

4. Comment e of the Restatement Second of Torts, § 46 provides that the extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.

susceptibility to emotional distress from being fired,[5] should be held to be so extreme and outrageous as to make Shearer liable. Finding that "the circumstances of Edmondson's discharge may, in the minds of some, reflect poorly on Shearer Lumber," the district court nevertheless concluded that the manner of discharge and the attendant circumstances in Edmondson's case "do not rise to the level of creating a jury issue on his intentional infliction of emotional distress claim."

Even if a defendant's conduct is unjustifiable, it does not necessarily rise to the level of "atrocious" and "beyond all possible bounds of decency" that would cause an average member of the community to believe it was "outrageous." *See Nelson v. Phoenix Resort Corp.*, 888 P.2d 1375 (Ariz.App.1994), *quoting Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (1987). Where the defendant has done no more than to insist upon his rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress, liability for intentional infliction of emotional distress does not lie. Restatement § 46, comment g. The dismissal of Edmondson's claim for intentional infliction of emotional distress, therefore, is affirmed.

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5. Comment f of the Restatement Second of Torts, § 46 provides that the extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.

Appendix A

CONCLUSION

The employer acted within its rights to discharge Edmondson, who was an at-will employee subject to termination for any reason or for no reason. Because Edmondson did not establish a policy exception to temper the at-will doctrine, neither the method of termination nor its justification are material. There were no facts in evidence supporting a claim of an implied-in-fact contract, and no facts of extreme and outrageous conduct rising to the level of creating a jury issue on the intentional infliction of emotional distress claim.

The order granting Shearer Lumber summary judgment is hereby affirmed. We decline to award attorney fees pursuant to I.C. § 12-121, based on our conclusion that plaintiff's legal arguments were not so plainly fallacious as to be deemed frivolous, where it was supported by a good faith argument for the extension or modification of the law in Idaho. *See Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 816 P.2d 320 (1991). Costs are awarded to the respondent, Shearer Lumber Products.

Justices SCHROEDER, EISMANN and Justice Pro Tem SCHWARTZMAN, **CONCUR.**

Justice KIDWELL, **DISSENTING.**

I wholeheartedly support the presumption that employment in Idaho is "at-will" unless otherwise provided. Unlike the majority, however, I would hold that there is a narrow, but important, public policy exception to the at-will

presumption for certain exercises of one's first amendment rights. Therefore, I respectfully dissent.

In *Sorensen v. Comm Tek, Inc.*, this Court stated the basic tenet of employment-at-will:

> Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons for which an employee may be discharged, the employment is at the will of either party and the employer may terminate the relationship at any time for any reason without incurring liability.

118 Idaho 664, 666, 799 P.2d 70, 72 (1990) (quoting *Spero v. Lockwood, Inc.*, 111 Idaho 74, 75, 721 P.2d 174, 175 (1986)). Public policy exceptions to employment at-will limit "the employer's right to discharge an employee without cause when the discharge would violate public policy." *Crea v. FMC Corp.*, 135 Idaho 175, 178, 16 P.3d 272, 275 (2000). The public policy exception protects at-will employees who refuse to commit illegal acts, perform important public duties, or who exercise certain rights and privileges. *Sorensen*, 118 Idaho at 668, 799 P.2d at 74 (*cited in Crea*, 135 Idaho at 178, 16 P.3d at 275). The public policy exception serves the purpose of balancing the often competing interests of society, the employer, and the employee. *Crea*, 135 Idaho at 178, 16 P.3d at 275.

As the majority has stated, public policy may be imbedded in statutes. *See, e.g., Watson v. Idaho Falls Consol. Hosps., Inc.*, 111 Idaho 44, 720 P.2d 632 (1986). I believe

that statutes are not the only place in which one may find public policy. Indeed, one may find the most significant public policies in this state and our nation in the Idaho Constitution and the Constitution of the United States. Thus, I would hold that certain constitutional public policies deserve protection and vindication through the public policy exception to at-will employment even in the absence of a statutory enactment.

One such policy that deserves protection in the at-will employment context is the policy of encouraging participation and debate regarding issues of public concern. The Idaho Constitution makes clear that "[a]ll political power is inherent in the people. Government is instituted for their benefit, and they have the right to alter, reform, or abolish the same whenever they may deem it necessary. . . ." Idaho Constitution Art. 1, § 2. In order to exercise the political power inherent in the people, the Idaho and United States constitutions endow individuals with the liberty to speak freely and participate in vigorous public debate. United States Constitution, Amend. 1; Idaho Constitution Art.1, § 9. Allowing employers to terminate employment based on an individual's association and speech regarding public issues that may have little or nothing in connection with the employer's business, invites employers to squelch the association, speech, and debate so necessary to our system of government. This is particularly true in the context of the myriad of small Idaho communities with only one or two prominent employers. Thus, I would hold it against public policy to discharge an employee for constitutionally-protected political speech or activities regarding a matter of public

concern, provided that such speech or activity does not interfere with the employee's job performance or the business of the employer.

The majority cites to *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 589-90 (1998), for the proposition that absent a state action, the constitutional exercise of free speech is not a public policy exception to at will employment. It is my opinion that even absent a state action, a very narrowly drawn public policy exception to the employment at-will doctrine should apply. That narrowly drawn exception would require a two-step analysis. First, did the at-will employee's speech impact the employer's business in *any* manner? If so, was the employee terminated because of his or her speech? The free speech public policy exception would apply to at-will employment in the case where the employee's speech does not impact the employer's business and the employee was terminated for the speech. In *Tiernan* the plaintiff was fired because she wrote a letter to the editor criticizing her employer. Under this proposed public policy exception, the plaintiff's speech clearly impacted her employer and her termination was lawful.

In this case, the evidence in the record clearly creates genuine issues of material fact regarding whether Edmondson was terminated for political speech or activities regarding a matter of public concern. Further, the record shows genuine issues regarding whether Edmondson's speech and activities interfered with his job performance or the business of his employer. On these grounds, I would vacate summary judgment and remand this matter for further proceedings.

APPENDIX B — OPINION AND ORDER OF THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO DATED OCTOBER 25, 2001 AND FILED OCTOBER 26, 2001

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

Case No. CV 33016

MICHAEL J. EDMONDSON,

Plaintiff,

v.

SHEARER LUMBER PRODUCTS, a division of BENNETT LUMBER PRODUCTS INC., an Idaho corporation,

Defendant.

OPINION AND ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

The Court heard argument of the parties and now, having fully considered all documents and briefs submitted, issues its opinion and order. This shall constitute this Court's findings of fact and conclusions of law. Defendant Shearer Lumber ("Shearer") brought a motion for summary judgment, and Plaintiff Michael Edmondson ("Edmondson") responded with a cross-motion for partial summary judgment (based

on the public policy exception to at-will employment). Edmondson also filed a motion to amend the complaint to add a claim for punitive damages, to supplement the record and to strike.

MOTIONS TO STRIKE AND SUPPLEMENT THE RECORD

The Court will not strike paragraph 9 of John Bennett's affidavit. It will be given the weight to which it is entitled, considering it contradicts earlier testimony under oath. Defendant did not object to Plaintiff's motion to supplement the record with a second affidavit from Edmondson. In addition, the Court finds its admission causes no prejudice to the defendant.

SUMMARY JUDGMENT MOTIONS

Courts ordinarily consider each summary judgment motion on its own merits, and draw all reasonable inferences therefrom in favor of the non-moving party. However, cross motions for summary judgment which rely on the same facts, issues and theories suggest that the parties are stipulating that no genuine issues of material fact exist. As a result, this Court can reconcile conflicting inferences on the factually uncontroverted issues. *See Brown v. Perkins,* 129 Idaho 189, 923 P.2d 434, 436 (1996), *reh. denied; Duff v. Seubert,* 110 Idaho 865, 719 P.2d 1125 (1985). Although Edmondson questions whether his expressed opposition to the Federal Lands Task Force proposal advocated by his employer was the *only* reason for Shearer terminating his employment, he does not appear to contest that it was *one* of the primary reasons and the only reason given to him by Shearer. That is,

the parties agree on the basic facts and ask that this Court essentially decide whether, under the facts, Edmondson's wrongful discharge claim survives as a matter of law.

The First Amended Complaint contains two claims. The first claim alleges that John Bennett, Operations Manager for Shearer, wrongfully terminated Edmondson's employment on February 15, 2000. The first claim (Paragraph II) states:

> 2.2 That the employment relationship between Edmondson and Shearer Lumber was and is subject to the implied covenant of public policy exception to the employment at will doctrine that provides an employer is liable in damages for discharge when the motivation for the discharge contravenes public policy.
>
> 2.3 That any conversation(s) Edmondson may have allegedly had concerning "political activities," constitute his exercise of his constitutionally protected right of free speech and right of freedom of association under both the First Amendment of the Constitution of the United States and the Constitution of the State of Idaho, Article 1, §§9 and 10.
>
> 2.4 That it is alleged upon information and belief that the motivation for the termination of Edmondson by David Paisley for and on behalf of John Bennett, for and on behalf of Shearer Lumber was that Edmondson exercised his said rights to freedom of speech and association. . . .

The second claim (Paragraph III) alleges intentional infliction of emotional distress.

Appendix B

Claim One: The Public Policy Exception

Factual Summary. Plaintiffs counsel argues that he is not conceding that Edmondson's employment at Shearer was an at-will relationship. However, the amended complaint itself indicates at-will employment, and the plaintiff's documents do not allege a breach of contract applicable to a for-cause relationship. In fact, this Court cannot analyze an exception to the at-will doctrine unless the doctrine itself first applies.[1] Because Plaintiffs have not brought such a claim for breach of an implied contract, the Court need not address it.[2]

The most important submissions to the Court are the depositions and affidavits of Plaintiff Michael Edmondson, David Paisley (on-site mill manager) and John Bennett (general manager). Edmondson worked for Shearer Lumber without incident for twenty-two years before the sudden termination of his employment in February 2000. His position was that of maintenance supervisor and assistant plant manager at the Elk City mill, whose job duties included plant

1. The record at present supports the finding that the relationship was at-will, and Plaintiff's counsel presented no evidence to the contrary. The employee manual, signed by Edmondson, provides that nothing in the manual or any other communication creates an employment contract, and that Shearer could terminate the at-will relationship at any time, with or without cause.

2. Plaintiffs raised this issue for the first time in their memorandum in opposition to the defendant's motion. This is not the proper way to assert a breach of contract claim, and Plaintiffs did not move to amend the complaint to add such a claim.

maintenance and hiring and firing employees. His latest job evaluation in June of 1999 was "very good."

Edmondson attended a Save Elk City meeting on January 14, 2000, regarding proposals for timber management introduced by the Public Lands Task Force. Save Elk City submitted a pilot project proposal to the Force and was seeking community support for the project at the meeting. Dick Wilhite (Shearer Resource Manager) attended and announced that the purpose for the proposal was to get logs to the sawmill in Elk City. Edmondson cannot recall making any public comments at the meeting regarding the proposal. After studying the process and alternative proposals, Edmondson decided that he thought a better alternative was not the one proposed by Shearer (the collaboration alternative), but another one (the trust alternative).

Michael Edmondson testified at his deposition:

> A. . . . I would also like to add—. . . that at the public meeting was the idea that in order to save Elk City, that that also was stated by saving Elk City we save the mill or by saving the mill we save Elk City.
>
> Q. Did you agree with that statement.
>
> A. I questioned that.
>
> * * *
>
> A. I attended a pubic meeting as a public. . . .

Q. So you didn't give Shearer Lumber any, you know, any greater weight merely because you were employed by them in determining what you felt would be the best alternative?

A. I guess I come back to because I feel like it's kind of a leading question. If any kind of a public process—I don't necessarily vote, when I go vote for an elected individual, with Shearer Lumber's interest as being foremost. It is my responsibility as being a father, a Christian, a citizen of the United States, you know, that I guess, Shearer Lumber is not the top priority in my life.

Q. Did you, after the January 2000 Save Elk City meeting express to anyone from Shearer Lumber that you felt that the trust alternative was the better alternative?

A. I may have, but I don't specifically recall. . . .

Edmondson did not specifically recall voicing his objections to the proposal advocated by Shearer or statements critical of Dick Bennett to Rick Farmer (sawmill foreman) and Paul Gilmore (shop worker). He did state:

A. I came in contact with just about everybody in the sawmill every day on a work basis. . . . most likely there were conversations that occurred as far as — as a result of the Save Elk City meeting, and I may have expressed that to new a trust alternative is a good thing. To who those individuals were or the specific time, date,

I don't recall. I guess I leave open the possibility that I mentioned those things. . . .

Regarding later warnings to refrain from voicing his objections publicly, Edmondson testified:

> Q. Did you understand from your conversation on January 25, 2000, [with] Mr. Wilhite, that he was asking you to support the collaborative alternative that had been discussed at the January 2000 Save Elk City meeting. . . .
>
> A. Number one, I don't think the word ask described. I felt that I was threatened and that and I—I felt like I was told that I was not to have any opinion other than—and that may not even be an accurate—because it wasn't that he stated that there was any opinion—I guess I would just submit this document as being my answer to that question.
>
> A. . . . I was told that this thing is very political and politicians will stay away from anything that looks at all controversial. He stated that any attempt by the Elk City Area Alliance . . . to derail this project would have serious consequences. As a company they would like to have all of its employees support projects that the mill is involved in.

On January 26, 2000, Edmondson met with Paisley and was warned that serious consequences could result if Edmondson opposed the collaborative plan. On February 2, 2000, Edmondson officially met with John Bennett, Paisley, and Wilhite, and was again warned that Shearer would not keep

in its employ someone who does not support company endeavors, including the collaborative proposal. Edmondson was asked not to express his objections to other mill employees and cause controversy about the proposal.

Edmondson attended a second Save Elk City meeting on February 10, 2000. Shearer terminated Edmondson's employment on February 15, 2000. Paisley read the following statement to Edmondson:

> Because of your continued involvement in activities that are harmful to the long term interests of Shearer Lumber Products, we are terminating your employment immediately. . . .

Edmondson turned in his keys, collected some belongings from his locker, and was physically escorted from the plant. David Paisley explained that it was not his decision to fire Edmondson, but John Bennett's:

> Q. . . . What activities did you believe Mr. Edmondson was involved in that were not in the best interest of Shearer Lumber causing you to terminate him? . . .
>
> A. I'm not real sure I do know the answer. Even though I was the gentleman's supervisor, I'm not sure at this time that I can state exactly what the reasons were.
>
> Q. Did you fire him?
>
> A. Did I fire him? Yes. At the direction of the management of this company.

Appendix B

John Bennett testified:

> A. Okay, the way events occurred, it was not like there was a meeting and the discussion was, should Mike Edmondson be terminated, but more that the people that I mentioned to you at one point or another provided information that I ultimately used in making the decision to terminate Mike. . . .
>
> * * *
>
> A. Yes. The reason that Mr. Edmondson was terminated was that he was opposing Shearer Lumber's involvement—let me rephrase that. He was opposing the Federal Lands Task Force project that Shearer Lumber Products supported, and we felt that by him opposing his opposition to that project were in direct conflict with the goals of Shearer Lumber Products.
>
> Q. Okay. How did you come to the conclusion. . . . What was your understanding of how Mr. Edmondson was opposing Shearer Lumber's Federal Lands Task Force application?
>
> A. It was my understanding that he had attended meetings of the Federal Lands Task Force; that he had contacted the bureaucrat who was in charge of the administration of the Federal Lands Task Force project and also through conversations with Dick Wilhite, Wilhite relayed to me that Mike Edmondson was opposed to the project that we were supporting. And Dick was concerned that Mike's continued opposition could end up in no project

at all coming out of the process or no project that would be helpful to us because of Mike's opposition.

* * *

A. It was my understanding that we have the right to terminate an employee who was violating our—either violating our rules or was engaged in activities that were harmful to our long-term interests, and because that was the reason that Mr. Edmondson was being terminated, that is why I included that language that I provided to Dave [Paisley].

Bennett explained in his affidavit that "Shearer Lumber had a critical interest in the collaborative plan that was being proposed by the Save Elk City group. Shearer Lumber, because of its dependence upon being able to obtain logs from timber sales in the Nez Perce National Forest, needed a plan that would insure a continued supply of logs for the Elk City sawmill. . . . Shearer Lumber believed that the collaborative proposal to the Federal Lands Task Force was the best way to insure a continuing supply of logs to the Elk City sawmill."

Analysis. The public policy exception to the employment at-will doctrine limits a private employer's right to discharge an employee without cause[3] when the discharge violated public policy. *Crea v. FMC Corp.*, 135 Idaho 175, 16 P.3d

3. The parties did not raise the issue of whether Shearer's reason to discharging Edmondson constituted good cause under the agreed facts. Therefore, this opinion does not address this defense to Edmondson's first claim

272, 275 (2000). The purpose of the exception is to balance the competing interests of society, employers and employees, in light of modern business experience. *Id.* The exception generally protects employees who: (1) refuse to commit unlawful acts; (2) perform important public obligations; or (3) exercise certain legal rights or privileges. *Id., citing Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 668, 799 P.2d 70, 74 (1990). Examples of public policy exceptions include retaliatory discharges where an employee refused to commit perjury,[4] filed a worker's compensation claim,[5] served on jury duty,[6] refused to date her supervisor,[7] joined a union,[8] reported safety code violations to a state agency,[9] and obeyed a

4. Idaho Code sections 18-2604 and 18-5410 specifically prohibit any person from intimidating a witness or suborning perjury.

5. Title 72 specifically affords employees the right to file such claims against their employers.

6. Idaho Code §2-218 specifically forbids an employer from penalizing an employee for jury service.

7. Idaho Code sections 18-7303 and 67-5909 prohibit sexual discrimination by employers.

8. Idaho Code §44-2001 specifically affords employees the right to work, regardless of membership in, affiliation with or financial support of a labor union, or regardless of a refusal to join or affiliate with the a labor union.

9. Idaho Code sections 6-2101 and 6-2102 prohibit a public employer from taking adverse action against as public employee because he or she reported waste of public funds or suspected violation of a state law or regulation.

court-issued subpoena.[10] *See Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Roberts v. Board of Trustees,* 134 Idaho 890, 11 P.3d 1108 (2000); *Watson v. Idaho Falls Consol. Hosps. Inc.*, 111 Idaho 44, 720 P.2d 632 (1986); *Ray v. Nampa School Dist. No. 131,* 120 Idaho 117, 814 P.2d 17 (1991); *Hummer v. Evans,* 129 Idaho 274, 923 P.2d 981 (1996), *reh. denied.* The *Sorensen* Court explained:

> The claim that failure to negotiate is a violation of public policy, in the absence of a statute requiring employers to bargain with employees, is not supported by our prior cases. Accordingly, the district court did not err in granting summary judgment to Comm Tek on Sorensen's claim of breach of public policy by discharging an employee who attempts to negotiate [the terms of employment].

799 P.2d at 74-75.

Under the above authorities, Plaintiff must provide sufficient evidence to establish that genuine issues of material fact exist regarding the elements of his claim. Edmondson claims that his attendance at public meetings and his expressions of opinion on the proposal to other persons are protected by public policies favoring freedom of speech.

Initially, there appears to be no dispute that Edmondson was entitled to, and did, attend the public Save Elk City meetings. There is, however, no evidence in the record that

10. Idaho Code § 19-3010, in addition to the perjury laws, punishes failure to obey a subpoena with contempt.

this resulted in his termination. Regardless, there is no Idaho law expressing a public policy favoring public participation or input at public meetings. *Compare* I.C. §67-2342 (government cannot hold public meeting at place which discriminates; no secret ballots).

Regarding the right to speak freely, Shearer is correct that Article I, Section 9 protects citizens from governmental, not private, action. *See State v. Johnson,* 110 Idaho 516, 716 P.2d 1288 (1986) (state constitutional provisions only prohibit illegal governmental actions, and not actions of private citizens); *Garner v. Evans,* 110 Idaho 925, 719 P.2d 1185 (1986) (state constitution limits power of government); *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969). Shearer is a private corporation and no state action is alleged. No Idaho decision to date applies a state constitutional provision in the context of the public policy exception or to the actions of a private employer.[11] Under the majority view (of those courts that have faced this issue), the constitutional right to freedom of speech cannot be the basis of a public policy exception.

The New Mexico Supreme Court explained best why no clear public policy exists with regard to private employers:

> **The linchpin of a cause of action for retaliatory discharge is whether by discharging the complaining employee the employer violated**

11. The Court in *Sorensen* declined to address the claim that Sorensen's discharge resulted from or violated his freedom of religion. 799 P.2d at 75. There is no statutory right to freedom of speech or expression in Idaho.

a "clear mandate of public policy." A clear mandate of public policy sufficient to support a claim of retaliatory discharge may be gleaned from the enactments of the legislature and the decisions of the courts and may fall into one of several categories. First, legislation may define public policy and provide a remedy for a violation of that policy. Second, legislation may provide protection of an employee without specifying a remedy, in which case an employee would seek an implied remedy. Third, legislation may define a public policy without specifying either a right or a remedy, in which case the employee would seek judicial recognition of both. **Finally, "[t]here may, in some instances, be no expression of public policy, and here again the judiciary would have to imply a right as well as a remedy."**

Every statute enacted by the legislature is in a sense an expression of public policy but not every expression of public policy will suffice to state a claim for retaliatory discharge. "'[U]nless an employee at will identifies a specific expression of public policy, he may be discharged with or without cause.'" **Accordingly, the courts interpreting New Mexico law have adhered to the rule that retaliatory discharge is a narrow exception to the rule of employment at will and have refused to expand its application.** *See Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1475-76 (10th Cir. 1988) (discharge for refusal to take polygraph examination did not violate

public policy); *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985) (discharge for use of employer's grievance procedure did not violate public policy); *Jeffers v. Butler,* 762 F.Supp. 308, 310 (D.N.M. 1990) (holding that no public policy stated where employee, and not public at large, would benefit from employee's whistle-blowing actions), *aff'd without opinion,* 931 F.2d 62 (10th Cir. 1991); *Salazar v. Furr's, Inc.,* 629 F.Supp. 1403, 1409 (D.N.M. 1986) (family unity is not public policy protected by retaliatory discharge cause of action); *Paca v. K-Mart Corp.,* 108 N.M. 479, 480-81, 775 P.2d 245, 246-47 (1989) (discharge for violation of company policy did not violate public policy); *Francis v. Memorial Gen. Hosp.,* 104 N.M. 698, 701, 726 P.2d 852, 855 (1986) (nurse discharged for refusing to follow employer's policy regarding "floating" did not state claim for retaliatory discharge); *Maxwell v. Ross Hyden Motors, Inc.,* 104 N.M. 470, 474, 722 P.2d 1192, 1196 (Ct. App. 1986) (Unemployment Compensation Law does not establish public policy prohibiting discharge in bad faith and without notice); *Zamora v. Sears, Roebuck & Co.,* 100 N.M. 414, 416-17, 671 P.2d 662, 664-65 (Ct. App.) (discharge based on employer's erroneous belief that employee had attempted to steal from employer did not violate public policy), *cert. denied,* 100 N.M. 439, 671 P.2d 1150 (1983). In fact, in only three reported cases have the courts in this state recognized a public policy sufficient to support a cause of action for retaliatory discharge:

Salazar, 629 F.Supp. at 1409 (recognizing retaliatory discharge cause of action when employee discharged to prevent vesting of pension benefits); *Boudar,* 106 N.M. at 283, 285, 742 P.2d at 495, 497 (recognizing retaliatory discharge cause of action when plaintiff discharged for whistleblowing); *Vigil,* 102 N.M. at 690 699 P.2d at 621 (recognizing retaliatory discharge cause of action when plaintiff discharged for reporting misuse of public funds). **Whether an employee has stated a sufficient public policy to recover for the tort of retaliatory discharge is determined on a case-by-case basis.** *Vigil*, 102 N.M. at 689, 699 P.2d at 620. . . .

Shovelin cites four cases from other jurisdictions that he contends . . . have allowed a private employee to support a claim of retaliatory discharge for the violation of a public policy as evidenced by a constitutional provision. . . . **While each of these cases recite the proposition that a constitutional provision may reflect a public policy sufficient to support a claim for retaliatory discharge, none of the cases specifically involve a constitutional provision. In both *Bloom* and *Parnar*, the public policy was derived from statutes. Since the decision in *Palmateer*, Illinois has refused to recognize a retaliatory discharge cause of action based on state and federal constitutional rights to free speech.** *See, e.g., Barr v. Kelso-Burnett Co.,* 106 Ill.2d 520, 88 Ill. Dec. 628, 630-31, 478 N.E.2d 1354, 1356-57 (1985) **(holding that state and federal constitu-**

tional provisions, such as right to free speech, limit power of government and are not limitation on relationship between private employer and its employees). Numerous courts in other jurisdictions have agreed. *See Lee v. Wojnaroski,* 751 F.Supp. at 62-63 (holding that discharge for alleged political activities did not state a claim for wrongful discharge under Pennsylvania law); *Newman v. Legal Servs. Corp.,* 628 F.Supp. 535, 540 (D.D.C. 1986) (holding that allegations that plaintiffs were discharged for exercising constitutional rights of freedom of speech and association are not actionable against private employer); *Grzyb v. Evans,* 700 S.W.2d 399, 401-02 (Ky. 1985) (rejecting public policy exception to employment at will based on constitutional right of freedom of association); *Allen v. Safeway Stores, Inc.,* 699 P.2d 277, 283 (Wyo. 1985) (rejecting public policy exception to employment at will based upon state and federal constitutional rights to free speech).

Shovelin v. Central New Mexico Electric Cooperative, Inc., 115 N.M. 293, 303-309, 850 P.2d 996, 1006-1012 (1993) (other citations and footnotes omitted; emphasis added). *See also Drake v. Cheyenne Newspaper, Inc.*, 891 P.2d 80 (Wyo. 1995) (right to free speech does not extend to private property or protect employee from discharge); *Dossett v. First State Bank,* 627 N.W.2d 131 (Neb. 2001) (state action required); *Johnson v. Mayo Yarns, Inc.*, 484 S.E.2d 840 (N.C. App. 1997) (free speech in a workplace setting does not constitute a public policy); *Prysak v. R.L. Polk Co.*, 483 N.W.2d 629

(Mich. App. 1992) (unlike statutory provisions that provide basis for exception, constitutional right to free speech does not extend to private conduct); *Korb v. Raytheon Corp.*, 574 N.E.2d 370 Mass. 1991) (no public policy prohibits employer from discharging employee speaking out on matter of public concern with which employer disagreed).

This Court agrees with the New Mexico analysis—as a matter of law, there is no public policy exception based on Article 1, Section 9 of the Idaho Constitution, in the private, at-will employment context. As the *Korb* Court, *supra*, noted:

> Korb characterizes the public policy at issue too broadly. His situation is not that of an employee who is fired for speaking out on issues in which his employer has no interest, financial or otherwise. To the contrary, Korb was hired to be the corporation's spokesperson, and he spoke against the interests of the corporation. The topic was one of acute concern to Raytheon. . . . Although Korb has a secured right to speak out on matters of public concern, and he has a right to express views with which Raytheon disagrees, he has no right to do so at Raytheon's expense. . . . Korb is free to express whatever opinions he wishes. Raytheon need not pay him to do so.

574 N.E.2d at 372-73.

Furthermore, the record shows that Shearer terminated Edmondson's employment because he was expressing his opposition to other employees at work on the Shearer premises. Shearer warned Edmondson that such continued conduct

would have dire consequences. Even if the state constitutional right speak freely constitutes an expression of a public policy in Idaho, it does not rise to the level of a statement of public policy which prevents an employer from discharging an employee at will for conduct at the workplace. *See Ray,* 814 P.2d at 22 (general statement that Idaho encourages continued employment because unemployment threatens the health, morals and welfare of state citizens). As previously noted, the public policy exception is construed narrowly so that its application does not subsume the at-will doctrine itself. Had the Idaho constitution or an Idaho statute provided specifically that private employers cannot terminate employment based on an employee's freedom to express his opinions and beliefs, the claim would be more tenable, but such a provision does not exist in Idaho. It is for the Idaho Legislature to set forth a clear public policy mandate, as it has in other instances. *Compare* I.C. §2-218 (private employer cannot discharge employee for serving on jury); I.C. §6-2104 (employee whistleblower protection); I.C. §§18-7303, 67-5909 (right to work cannot be impaired based on race, creed, color sex or national origin); I.C. §44-1509 (private employer cannot discharge employee for enforcing minimum wage law).[12] The same conclusion applies to

12. The *Connick v. Meyers* opinion, 461 U.S. 138, 75 L.Ed.2d 78 (1983), cited by the Supreme Court in *Gardner v. Evans,* 110 Idaho 925, 719 P.2d 1185 (1986), involved wrongful discharge and civil rights claims by a public employee, alleging improper infringement of the First Amendment by her public employer. It has no application to a private employer or a wrongful discharge claim Similarly, all of the public policy cases cited by Plaintiffs involve inapposite facts (serving on a jury, refusing to commit perjury, engaging in union activities, opposing sexual harassment, refusing to commit indecent exposure).

Edmondson's freedom of association claim under Article I, Section 10 of the Idaho Constitution.

Regarding Edmondson's allegations related to purported impoundment of logs possibly at the instigation of his wife the day before his termination, no exception to the at-will employment exception applies. There is no clear statutory, constitutional or other public policy forbidding an at-will employee from being terminated for this reason, assuming it was one of the reasons for Edmondson's discharge.

Claim Two: Intentional Infliction of Emotional Distress

Plaintiff must prove: intentional or reckless conduct by Shearer, that is extreme and outrageous, which caused severe emotional distress. *Evans v. Twin Falls County,* 118 Idaho 210, 220, 796 P.2d 87 (1990). Edmondson's affidavit states that he was taken to his office, then his locker, and then escorted from the premises with what belongings he could collect in the short time he was allowed. When he was allowed to return later to collect the rest of his things, his locker had been forcibly entered and tools removed. He had never before seen anyone escorted from the mill as he was on February 15, 2000.

As to his distress, Edmondson explained:

> For a period of several months I stayed close to home and avoided contact, whenever possible, with the Elk City area residents out of my humiliation and my perception that the area residents felt that I had done some act of an

> extremely inappropriate nature to have warranted by sudden termination after 22 years. I have not been able to sleep good since the termination. Since the termination, I have gained weight, my emotional well-being has been affected because I have begun to feel "old" and disillusioned about right and wrong in the world. I have felt lethargic, had difficulty concentrating, and I have a feeling of personal helplessness. . . . This has been emotionally devastating because I have been unable to help my children nor even really "celebrate" my 25th wedding anniversary.

Shearer's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Restatement (Second) of Torts §46, com. d.* Shearer cannot be liable if it has done no more than insist on its legal rights in a permissible way, even though it is aware that such insistence may cause emotional distress to another. *Id.* at *com. g.*

The primary issue is whether Edmondson presented sufficient evidence with which a jury could reasonably conclude that Shearer's conduct, in having Edmondson escorted by security personnel off of the premises shortly after his discharge, was outrageous and extreme under the aforestated standard. *See Restatement (Second) of Torts §46 com. h.* Other courts have addressed this issue (although not the Idaho appellate courts). In *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 888 P.2d 1375 (App. 1994), *rev. denied*, the court analyzed the following facts:

> Plaintiff first learned of his termination on November 16, 1989. At approximately 2:00 a.m., he received a phone call at home from the director of the resort's computer systems, advising him that FDIC officials were requesting computer passwords. Plaintiff authorized the release of the requested information and then went to the resort to assist with the management change. While in his office, plaintiff was approached by two security persons who requested that he accompany them to the lobby. When he stopped on the way at a restroom, the men followed him into the bathroom stall. After they escorted him to the lobby, he was given a termination letter, and was told to leave the resort without going back to his office to remove any personal belongings. The media reports for the following few days had extensive news coverage of the removal of Keating and his perceived loyalists from the Phoenician, though plaintiff was not mentioned by name or shown in any of the coverage.

181 Ariz. at 193, 888 P.2d at 1380. Keating sued the employer for intentional infliction of emotional distress. The Court of Appeals affirmed the trial court's refusal to send the claim to the jury:

> [T]he trial court must, on the first element, make a preliminary determination whether the conduct may be considered so outrageous and extreme so as to permit recovery. *Cluff v. Farmers Ins. Exch.*, 10 Ariz. App. 560, 562, 460 P.2d 666, 668 (1969);

see also Restatement (Second) of Torts § 46. That issue may only go to the jury where "reasonable minds may differ." *Restatement, supra.* **Even if a defendant's conduct is unjustifiable, it does not necessarily rise to the level of "atrocious" and "beyond all possible bounds of decency" that would cause an average member of the community to believe it was "outrageous."** *Ford v. Revlon, Inc.,* 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987); *Lucchesi,* 149 Ariz. at 78, 716 P.2d at 1015; *see also Watts v. Golden Age Nursing Home,* 127 Ariz. 255, 619 P.2d 1032 (1980) (unjustifiable delay in failing to notify wife of husband's terminal illness was not outrageous); *Duhammel v. Star,* 133 Ariz. 558, 653 P.2d 15 (App. 1982) (false accusations against police officer not outrageous conduct justifying claim for emotional distress).

We have reviewed the evidence and allegations concerning the manner in which plaintiff was terminated from employment. We agree with defendants and the trial court that plaintiff did not provide evidence of outrageous and extreme conduct sufficient to survive a motion for summary judgment. **Other courts too have concluded that similar circumstances surrounding an employer's method of discharging an employee, whether wrongful or not, simply did not rise to a level of conduct extreme enough to establish such a claim.** *See, e.g., Lapidus v. New York City Chapter of the New York State Ass'n*

> *for Retarded Children, Inc.*, 118 A.D.2d 122, 504 N.Y.S.2d 629, 633 (1986) (plaintiff's "humiliation" at being "thrown out in the middle of a working day and told not to go back to [his] office," coupled with information rapidly spread among his peers about what was done to him, with resulting mental depression and shock, not sufficient to state a claim for intentional infliction of emotional distress).

181 Ariz. at 199-200, 888 P.2d at 1386-87 (emphasis added). The *Lapidus* Court, referenced to by the Arizona Court, discussed cases involving similar facts:

> In *Murphy v. American Home Prods. Corp., supra,* 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, the plaintiff, in support of his intentional infliction of emotional distress claim, alleged that his termination "was deliberately and viciously insulting, was designed to and did embarrass and humiliate [him] and was intended to and did cause [him] severe mental and emotional distress thereby damaging [him]." (*Id.* at 298, 461 N.Y.S.2d 232, 448 N.E.2d 86.) **He claimed that someone had broken into his desk, that he had been escorted from the building by guards and that his belongings were dumped onto the street. The court dismissed the claim nevertheless, ruling that the allegations as to the manner of plaintiff's dismissal fell far short of the strict standard New York imposes upon such a claim.** *(See, also, O'Donnell v. Westchester Community Serv. Council, supra,* 96 A.D.2d 885, 466 N.Y.S.2d

> 41 [the plaintiff's cause of action for intentional infliction of emotional distress for the "anxiety, humiliation, and indignities" allegedly arising from his termination of employment could not be maintained since he had failed to allege that the defendant's conduct was extreme and outrageous or that it exceeded all bounds usually tolerated by a decent society]; *Brinks, Inc. v. City of New York,* 533 F.Supp. 1122 [the plaintiff's intentional infliction of emotional distress claim dismissed notwithstanding his allegations that he suffered "severe emotional distress" after he was demoted, harassed, and subjected to verbal abuse]. The same result is dictated here. **In this regard it is also significant that in *Murphy* the court, noting its holding that New York does not recognize tort liability for abusive or wrongful discharge, stated: "plaintiff should not be allowed to evade that conclusion or to subvert the traditional at-will contract rule by casting his cause of action in terms of a tort of intentional infliction of emotional distress** [citation omitted]." (58 N.Y.2d at 303, 461 N.Y.S.2d 232, 448 N.E.2d 86.)

Lapidus v. New York City, 118 A.D.2d at 131, 504 N.Y.S.2d at 634 (1986) (emphasis added). The Connecticut appellate court reached the same conclusion:

> We conclude that the court properly held that the plaintiff in this case failed to allege sufficient facts to establish one of the elements of her claim for intentional infliction of emotional distress, namely,

that the defendants' conduct was extreme and outrageous. In support of her claim that the defendants' conduct was extreme and outrageous, **the plaintiff alleged that the defendants had sent an armed security guard to notify her and her husband of their termination of employment and had given them only twenty-four hours to leave the premises. This happened at a time when the plaintiff was on vacation and when her husband was recovering from a planned surgery.** The plaintiff claimed that this caused her great emotional distress and anguish. While there are no Connecticut cases with facts exactly similar to those in this case, it is clear that there is liability only for "conduct exceeding all bounds usually tolerated by decent society. . . ." *Petyan v. Ellis, supra,* 200 Conn. at 254 n. 5, 510 A.2d 1337.

In a case involving a claim for negligent infliction of emotional distress, as opposed to intentional infliction of emotional distress, in which it was alleged that the plaintiff's employment was terminated with two hours notice and that the plaintiff employee was escorted from the work place by a security guard, the allegations were found to be insufficient to support the cause of action. *Parsons v. United Technologies Corp.,* 243 Conn. 66, 89, 700 A.2d 655 (1997). The elements of negligent and intentional infliction of emotional distress differ as to the state of mind of the actor

and not to the conduct claimed to be extreme and outrageous. *Parsons,* therefore, is instructive because the conduct alleged in the complaint in that case, even though it did not involve the right to occupy an apartment, is virtually identical to the conduct alleged to have been extreme and outrageous in the present case.

Here, the court relied on several cases from other jurisdictions with similar facts to conclude that the facts alleged by the plaintiff did not amount to conduct that was extreme and outrageous. *See Cox v. Keystone Carbon Co.,* 861 F.2d 390, 396 (3d Cir. 1988) **(employee's termination on day he returned to work after triple bypass surgery did not constitute extreme and outrageous conduct)**; *Freeman v. Kansas State Network, Inc.,* 719 F.Supp. 995, 1000 (D. Kan. 1989) **(termination of plaintiff's employment three days after she gave birth and on day she returned home from hospital did not constitute extreme and outrageous conduct).**

In this case, it is not alleged that the defendants or their security guard threatened the plaintiff or acted in a derogatory or demeaning manner toward her. As previously noted, the plaintiff was not present when the security guard came to notify her of the termination of her employment. [Footnote omitted.] **"The mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior"**;

(internal quotation marks omitted) *Parsons v. United Technologies Corp.*, supra, 243 Conn. at 89, 700 A.2d 655; **and does not give rise to a claim for the *negligent* infliction of emotional distress.** Furthermore, while the fact that the plaintiff was losing the right to use her apartment, in addition to being terminated from her employment, may have made the defendants' conduct more distressing to the plaintiff, that fact fails to establish that the defendants' conduct was extreme and outrageous. Because the occupation of the apartment was incidental to the employment and was presumably arranged because it was convenient for the purpose of employment, it is difficult to separate the termination of the employment from the termination of the occupancy. **We conclude that the allegations of count three of the plaintiffs amended complaint are insufficient to allege a cause of action for intentional infliction of emotional distress.**

Muniz v. Kravis, 59 Conn. App. 704, 709-11, 757 A.2d 1207, 1211 (2000) (emphasis added).

This Court is constrained to agree with both the analyses employed and the conclusions reached by the Arizona, New York anal Connecticut courts. Although the circumstances of Edmondson's discharge may, in the minds of some, reflect poorly on Shearer Lumber Products and the persons who discharged Edmondson in such an abrupt manner, they do not rise to the level of creating a jury issue on his intentional infliction of emotional distress claim. It is

indeed unfortunate that an employee of twenty-two years can be discharged under these facts, but the employment at will doctrine requires such a result.

MOTION TO AMEND COMPLAINT

Because this Court concludes that both of Plaintiffs claims must be dismissed on summary judgment, the motion to amend to add a claim for punitive damages is moot.

CONCLUSION

Plaintiff's motion to supplement is GRANTED. Plaintiff's motion to strike is DENIED. Plaintiff's motion for partial summary is DENIED. Defendant's motion for summary judgment is GRANTED. No costs or attorney's fees to either party.

DATED this 25 day of October, 2001.

s/ George R. Reinhardt
GEORGE R. REINHARDT, III
DISTRICT JUDGE

I, the undersigned, hereby certify that a true and correct copy of the foregoing document was mailed or delivered on the 26th day of October, 2001, on:

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Appendix B

CLERK OF DISTRICT COURT

By: s/ Jay Higgins
Deputy

APPENDIX C — OPINION OF THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO DATED APRIL 8, 2002

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

Case No. CV 33016

MICHAEL J. EDMONDSON,

Plaintiff,

v.

SHEARER LUMBER PRODUCTS, a division of BENNETT LUMBER PRODUCTS, INC., an Idaho corporation,

Defendant.

OPINION AND ORDER DENYING MOTION TO RECONSIDER

The Court heard argument of the parties and now, having fully considered all supplemental documents and briefs submitted, issues its opinion and order. This shall constitute this Court's findings of fact and conclusions of law. The Court also must consider Plaintiffs motion to amend the complaint to add a claim for violation of the covenant of good faith and fair dealing.

Appendix C

THE MOTION TO RECONSIDER

Edmondson's primary argument is that this Court misunderstood its legal argument regarding the public policy exception, by failing to distinguish between enforcement of the right to free speech in the civil rights context and using that right as a basis for a public policy exception. However, this Court in fact did recognize and address that distinction in its original opinion:

> Regarding the right to speak freely, Shearer is correct that this right only protects citizens from governmental, not private, action. . . . Shearer is a private corporation and no state action is alleged. **No Idaho decision to date applies a constitutional provision in the context of the public policy exception.**[1] **Under the majority view, the constitutional right to freedom of speech cannot be the basis of a public policy exception in the absence of state action.**
>
> This Court agrees with the New Mexico analysis —as a matter of law, there is no public policy exception based on Article I, Section 9 of the Idaho Constitution, in the private, at-will employment context. As the *Korb* Court, *supra*, noted:

---

1. The Court in *Sorensen* declined to address the claim that Sorensen's discharge resulted from or violated his freedom of religion. 799 P.2d at 75. There is no statutory right to freedom of speech or expression in Idaho.

> Korb characterizes the public policy at issue too broadly. His situation is not that of an employee who is fired for speaking out on issues in which his employer has no interest, financial or otherwise. To the contrary, Korb was hired to be the corporation's spokesperson, and he spoke against the interests of the corporation. The topic was one of acute concern to Raytheon. . . . Although Korb has a secured right to speak out on matters of public concern, and he has a right to express views with which Raytheon disagrees, he has no right to do so at Raytheon's expense. . . . Korb is free to express whatever opinions he wishes. Raytheon need not pay him to do so.

574 N.E.2d at 372-73.

Opinion and Order (October 26, 2001), pp. 8-11. The fact that Idaho's Constitution recognizes a right to speak freely does not translate into an exception to the at-will doctrine.

This Court's opinion is that there is in fact a distinction between a civil rights action and an employment rights action in Idaho; this distinction is precisely what deprives Edmondson of a cause of action in this case. The Court previously cited *Barr v. Kelso-Burnett Co.*, 106 Ill.2d 520, 478 N.E.2d 1354 (1985), which also addressed the distinction:

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[Plaintiffs] contend . . . that these provisions are indicators of public policy and thus a violation of these provisions by anyone is a violation of public policy. We disagree.

. . . The fact that a constitutional or statutory provision is cited in the complaint, however, does not give rise to a retaliatory-discharge cause of action. The test for determining if the complaint states a valid cause of action is whether the public policy clearly mandated by the cited provisions is violated by the plaintiff's discharge. **The application of this test necessarily involves determining what the public policy is behind the enactment or adoption of the particular provision. The public policy underlying a statutory or constitutional provision is found by examining the history, purpose, language and effect of the provision. The public policy clearly mandated by the provisions cited in plaintiff's complaint is that the power of government should be limited in those areas. The cited provisions mandate nothing concerning the relationship of private individuals, including private individuals in the employer-employee relationship. . . .**

The Illinois Constitution prohibits employers from discriminating on the basis of race, color, creed, national ancestry, sex, and mental or physical handicap. . . . **There is nothing in either the Illinois Constitution or the Illinois Human**

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Rights Act to mandate the inclusion of the right of free speech into those rights which are applicable to the employer-employee relationship.

106 Ill.2d at 527, 478 N.E.2d at 1357 (emphasis added; citations omitted). This Court likewise concluded:

> Had the Idaho constitution or an Idaho statute provided specifically that public and private employers cannot terminate employment based on an employee's freedom to express his opinions and beliefs, the claim would be more tenable, but such a provision does not exist in Idaho. It is for the Idaho Legislature to set forth a clear public policy mandate, as it has in other instances. *Compare* I.C. §2-218 (private employer cannot discharge employee for serving on jury); I.C. §6-2104 (employee whistleblower protection); I.C. §§18-7303, 67-5909 (right to work based on race, creed, color sex or national origin); I.C. §44-1509 (private employer cannot discharge employee for enforcing minimum wage law).

Opinion and Order, pp. 11-12. The facts revisited by Plaintiffs counsel do not change the outcome of this case.

THE MOTION TO AMEND

Although Plaintiff's counsel did fail to previously allege a claim for breach of contract, the record does not support such a claim. *See Opinion and Order*, *supra* at p. 3, note 1.

Appendix C

> Under Idaho law, unless there exists a contract which specifies the duration of the employment or limits the reasons for which an employee may be discharged, the employment is at the will of either party. In an employment-at-will-relationship either party may, without incurring liability, terminate the employment at any time for any reason that does not violate public policy. The parties may, however, agree to a contract term limiting the right of either to terminate the contract at will. A limitation on the at-will relationship may be express or implied. Such a limitation may be implied when, from all the circumstances surrounding the relationship, a reasonable person could conclude that both the employer and employee intended that either's right to terminate the relationship was limited by an implied-in-fact agreement. An employee handbook or manual that expressly defines the relationship as at-will may negate a claim of intent to restrict the grounds for discharge.

Moser v. Coca Cola Northwest Bottling Co., 129 Idaho 709, 931 P.2d 1227 (Ct.App. 1997); *see also Crea v. FMC Corp.*, __ Idaho __, 16 P.3d 272 (2000).

The employee manual and signed acknowledgment by Edmondson disclaim any limitation on the employer's right to terminate employees, and declare that employment with the company is at will and may be terminated at any time for any reason. Edmondson simply offers no evidence to support a claim that these provisions were modified or somehow did

not apply to Edmondson. The letter written to Edmondson after his termination regarding his salaried status does not modify his at-will status as regards his ability to be terminated. The letter only dealt with vacation pay for salaried employees.

Finally, with regard to the covenant of good faith and fair dealing, in light of the foregoing analysis, there is no evidence to support such a claim. The covenant of good faith and fair dealing is a judicially created exception to the employment at-will doctrine based on a contractual duty of good faith. *Sorensen*, *supra note 1*, 118 Idaho at 669, 799 P.2d at 75. Any action which violates, nullifies or significantly impairs any benefit or right which either party has in the employment contract, whether express or implied, is a violation of the covenant. *Crea*, 16 P.3d at 276. Because the plaintiff had no right to a specific length of employment, and also no right to be protected under the First Amendment in the employer-employee context, there has been no breach of the covenant. The conclusion reached regarding the public policy exception applies with equal vigor to the covenant of good faith and fair dealing.

For all of the foregoing reasons, Plaintiff's motion to reconsider and motion to amend the complaint are DENIED.

DATED this 8th day of April, 2002.

s/ George R. REINHARDT, III
George R. REINHARDT, III
DISTRICT JUDGE

Appendix C

I, the undersigned, hereby certify that a true and correct copy of the foregoing document was mailed or delivered on the 8th day of April, 2002, on:

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CLERK OF DISTRICT COURT

By: s/ Jay Higgins
Deputy

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF IDAHO DENYING PETITION FOR REHEARING DATED SEPTEMBER 4, 2003

IN THE SUPREME COURT OF THE STATE OF IDAHO

NO. 28541
Ref. No. 03RH 23

MICHAEL J. EDMONDSON,

Plaintiff-Appellant,

v.

SHEARER LUMBER PRODUCTS, a division of BENNETT LUMBER PRODUCTS, INC., an Idaho corporation,

Defendant-Respondent.

ORDER DENYING PETITION FOR REHEARING

The Appellant having filed a PETITION FOR REHEARING PURSUANT TO I.A.R. RULE 42 on August 7, 2003 and supporting BRIEF on August 22, 2003 of the Court's Opinion released July 23, 2003; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING PURSUANT TO I.A.R. RULE 42 be, and hereby is, DENIED.

Appendix D

DATED this 4th day of September 2003.

By Order of the Supreme Court

s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

APPENDIX E — BRIEF IN SUPPORT OF PETITION FOR REHEARING PURSUANT TO I.A.R. RULE 42 DATED AUGUST 20, 2003

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

Case No. CV-33016
Supreme Ct. Docket No. 28541

MICHAEL J. EDMONDSON,

Plaintiff/Appellant,

vs.

SHEARER LUMBER PRODUCTS, a division of BENNETT LUMBER PRODUCTS INC., an Idaho corporation,

Defendants/Respondents.

Appendix E

BRIEF IN SUPPORT OF PETITION FOR REHEARING PURSUANT TO I.A.R. RULE 42

INTRODUCTION

SLAVERY. The condition of a slave; that civil relation in which one man has absolute power over the life, fortune, and liberty of another. *Black's Law Dictionary*, Rev. 4th Ed.

This Court's holding that "an (at-will) employee does not have a cause of action against a private sector employer who terminates the employee because of exercise of the employee's constitutional right of free speech," effectively eliminates all fundamental liberty of the common man to exercise free speech and association in Idaho. This Court, contrary to the district court below did concede that "public policy of the state is found in the Constitution[1] and in statutes.

Then the Court immediately cites a recent Idaho federal district court case for the proposition that without case law, or statutory language that public policy does not exist beyond those areas already identified. In other words the cases cited in ***Jackson v. Minidoka Irrigation District***, 98 Idaho 330, 563 P.2d 54 (1977).[2]

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1. The District Court held that public policy is not found in the Constitution. Vol 2, p. 287; The Constitutional right to freedom of speech cannot be the basis of a public policy exception. R. Vol. 2, p. 268.

2. ***Lord v. Swire Pacific Holdings, Inc.***, 203 F. Supp.2d 1175 (D.Idaho 2002) It is noteworthy that this Court chose to ignore that (Cont'd)

The Court's analysis then in a fundamental analytical flaw confuses "public policy" with Constitutionally guaranteed rights requiring "state action."

PUBLIC POLICY

If this Court concedes, as its opinion reflects, that public policy is found in the U.S. and Idaho Constitutions then it is contrary, to accepted jurisprudence,[3] for it to conclude that the United States Constitution's First Amendment[4] and the Idaho Constitution's Articles 9 and 10 do not express public policy. It borders on a heresy like denial of these most essential and fundamental Constitutional rights of free speech and association for anyone to assert that these rights do not reflect Idaho's "public policy." Indeed under this Court's ruling, a private employer in Idaho can fire a caucasian employee for the *expressed* and *sole reason* that the employee

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(Cont'd)

Court's specific distinction that the case did not involve "an important public obligation or an exercise of a legal right or privilege." This Court also ignores the fact that federal district court decisions, predicting what Idaho law is, are not of precedential value.

3. *Black's Law Dictionary*, Rev. 4th Ed, defines jurisprudence as being the function of considering the ultimate effect which would be produced if the rule were applied to an indefinite number of similar cases, and to choose the rule which, when so applied, will produce the greatest advantage to the community.

4. It is the fundamental law and interest of the United States that freedom to communicate information and opinion be not abridged. ***Cantwell v. State of Connecticut***, 310 U.S. 296 (1940).

is dating or married to a person of color.[5] Logical extension (jurisprudence) of such an illogical proposition would be that an employer can fire an at-will employee for attending church, attending the wrong church, or for not attending any church. Indeed an at-will employee could be fired for the *express reason* of his attending a 4th of July parade, observing (or not observing) Easter, Thanksgiving and Christmas. Even an "at-will" employee's venturing forth to view the currently traveling original copy of the Declaration of Independence (on his own time) is a justifiable reason, in Idaho under this Court's decision, for his employer to fire him.

It is unconscionable that this Court would hold that fundamental rights specifically guaranteed by the U.S. and Idaho Constitution do not constitute "public policy,"of the State of Idaho. The safeguarding of freedom of speech to the ends that citizens may speak as they think on matters vital to them is essential to free government. ***Thornhill v. State of Alabama***, 310 U.S. 88 (1940) Federal and state forest management practices are obviously important to all residents of Idaho.

If this Court's opinion is to be read as requiring public policy to be specifically identified by the legislature or the Court, as the district court below required, then this Court need only look as far as Idaho Code §44-2001.

> **44-2001. Declaration of public policy.** – It is hereby declared to be the public policy of the state

5. Idaho Code §18-7902 Malicious Harassment would seemingly not apply because no physical injury is threatened or caused and since at-will employment is not considered a personal property right.

> of Idaho . . . that *the right to work shall not be subject to undue restraint or coercion.* (Emphasis added)

To the extent that enforcement of the common law at-will rule is repugnant to or inconsistent with subjecting an employee to undue restraint or coercion our legislature has abolished it. As discussed below, the Idaho version of "at-will" employment became a "rule of decision" under I.C. §73-116 in the 1977 case of ***Jackson v. Minidoka Irrigation Dist.***, 98 Idaho 330, *supra*. However, this rule of decision was legislatively modified greatly in 1985 with the adoption of I.C. §44-2001.

I.C. §44-2001 expressly limits the common law rule of "at-will" employment on the requirement that the termination not being undue restraint or coercion of the employee. Without this statute, termination for "any reason" under the "at-will" rule would include " termination for reasons constituting "undue restraint or coercion." This statute's very premise is that an employer cannot exercise "undue restraint or coercion" on its employees. Certainly no one can legitimately argue that preventing an employee from exercising his Constitutional rights of free speech and assembly is not "undue restraint or coercion." I.C. §44-2001 was not even mentioned in this Court's opinion although it was specifically brought to this Court's attention and argued in written argument. Failure to address it in such a landmark all encompassing opinion as issued by this Court err. (Appellant's Opening Brief, at page 31, FN5) I.C. §44-2001 is a specific legislative pronouncement clearly identified by bold print of Idaho *public policy* that unequivocally states

that "a person's right to work shall not be subject to undue restraint or coercion."

Given the jealous protection traditionally afforded U.S. (and Idaho) Constitution rights of speech and association by all Courts it is inappropriate and inconsistent jurisprudence for any court to knowingly enforce, as a condition of employment, a rule that any private employer can prevent "at-will" employees from attending any public meetings, or associating with persons that the employee chooses. It is hard to conceptualize a more significant "undue restraint or coercion" to employment.

This Court's position "that the Constitutional right to freedom of speech association and I.C.§44-2001 cannot be the basis of an Idaho public policy exception" to the "at-will" rule, R. Vol. 2, p. 268, cannot co-exist with fundamental concepts of a free society.

THIS COURT'S DECISION VIOLATES THE RIGHTS GUARANTEED TO INDIVIDUALS, SUCH AS EDMONDSON, BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION

This Court apparently fails to appreciate that it is *its* enforcement of Shearer's conduct in this case, in and of itself, that constitutes the very thing that the Court perceived as – the missing, but required "state action." This Court's enforcement of a common-law rule in a manner that places Idaho's Great Seal on a denial of Constitutional rights is the very essence of prohibited "state action." Nothing could be more repugnant to, or inconsistent with the Constitution of

the United States than for this Court to grant authority, to anyone, to violate an individual's right of free speech and association. This Court's symbiotic enforcement of otherwise private conduct that seeks to impose its will and control the minds, thoughts, and actions of its at-will employees nullifies the protections of fundamental constitutional principles. Such abusive use of the power and authority of the Courts, cannot be enforced or tolerated by any court. ***Shelley v. Kraemer***, 334 U.S.1 (1948) The very act of this Court's enforcement of a common law employment "at-will" rule in a manner which totally disregards fundamental U.S. Constitution and Idaho Constitution rights to free speech and association provides the "state action," required for application of the Fourteenth Amendment to prevent such an action.

Having established the err of this Court's holding that free speech and association are not supported by Idaho's public policy, the following argument will expose the fundamental err in this Court's jurisprudence in this case by (1) clarifying what the common law "at-will" rule is and how it came to be; (2) clarifying that the action taken by this Court constitutes "state action" for the purposes and meaning of the 14th Amendment of the United States Constitution; and (3) that this Court's decision, in and of itself, constitutes a violation of Edmondson's First Amendment and Fourteenth Amendment rights.

(1) COMMON LAW – "AT WILL" EMPLOYEE

The employment-at-will rule, referred to as Wood's Rule, is named after Horace C. Wood, who first articulated the proposition in his *1877* treatise *Master and Servant.*

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See William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege,* 21 Idaho L. Rev. 201, 202 (1985) The treatise's title, *Master and Servant,* under this Court's holding in this case, is appropriate in its characterization of the common law "at-will" employment relationship and its direct lineage to slavery. Through judicial interpretation of the common-law, private employers in Idaho have been given absolute control over their at-will employees' very lives.

It is nothing short of a distortion of American jurisprudence to interpret the common law rule of "at-will," when the intent of its exceptions, as this Court acknowledges, is to "balance the competing interests of society, the employer, and the employee in light of modern business experience," in a manner that throws all private "at-will" employees back into the ship hold of a master-slave relationship. Literally all aspects of the newly identified Idaho slaves' lives are now subject to being fully governed by private employers because of this Court's placement of its seal of approval on Shearer's conduct. Idaho's private at-will employees have been drug and thrown back to the days of the "Bull Pen" in the Coeur d'Alene Mining District[6] (*See Big Trouble*, J. Anthony Lukas) by this Court's opinion. Now, however, the fence is one of words, not wood and wire.

The "at-will" rule's formal introduction into Idaho by the Idaho Supreme Court was in ***Jackson v. Minidoka***

6. The vast majority of Idaho's workers are "at-will." The Bull Pen was a large fenced off enclosure where all Coeur d'Alene mining district miners were incarcerated for months, without charges or due process, in order to quell labor unrest.

Irrigation Dist.,*supra*. The Court as primary doctrinal authority referenced the language of the Missouri court in the case of ***Williams v. Kansas City Public Service Co.,*** 294 S.W. 2d 36 (Mo. 1956).

In explaining what it referred to as "at-will," the ***Jackson*** Court readily acknowledged that this common-law rule has significant exceptions. It held that a general (not a limited or narrow) exception to the "'at will" rule is if the motivation on the part of the employer contravenes public policy. By way of example, and not limitation, the ***Jackson*** Court went on to cite four private employer at-will cases where public policy was contravened by the motive for the firing. ***Peterman v. International Brotherhood of Teamsters***, 344 P.2d 25 (1959) (fired for answering question truthfully under oath); ***Frampton v. Central Indiana Gas Co.***, 297 N.E.2d 425 (1973) (fired for filing a worker's compensation claim); ***Mange v. Beebe Rubber Co.,*** 316 P.2d 549 (1974) (fired for serving on jury duty); and ***Nees v. Hock***, 536 P.2d 512 (1975) (fired for refusing to date a boss). These examples were never intended to be all inclusive. Indeed by our legislature's enactment of I.C. §44-2001 the exceptions were made extensive.

What the hard fought "Right to Work" laws, Title 44, Chapter 20 Idaho Code, took away in the form of power and authority of labor organizations it expressly gave back to individual employees by drastically limiting the type of conduct that employers could engage in with impunity. Specifically the legislation took away the power of an employer under the common law "at-will" rule, to subject employees to termination when the motivation for it constituted undue restraint or coercion.

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(2) THIS COURT'S DECISION IS "STATE ACTION" FOR PURPOSES OF THE FOURTEENTH AMENDMENT

Judicial action is action of the State within the *meaning* of the Fourteenth Amendment and it is to be regarded as action of the state for the *purposes* of the Fourteenth Amendment. This fundamental principle is unequivocally set forth by the U.S. Supreme Court in ***Shelley v. Kraemer***, *supra.*

In ***Shelley***, the U.S. Supreme Court recognized that so long as the purposes of a private agreement is effectuated by *voluntary adherence* no state action is involved and no violation of the Fourteenth Amendment has occurred. However the Court drew the clear line that when the provisions of the private agreement are sought to be enforced by the authority of state courts, and the Seal of the State's approval is placed thereon, it becomes "state action" for the purposes of the Fourteenth Amendment.[7] If such enforcement by a Court results in the violation of an individual's Constitutional rights the Court's action enforcing the agreement violates the Fourteenth Amendment.

State action in violation of the Fourteenth Amendment's provisions is equally repugnant to the constitutional mandates

7. So long as all the caucasians agree that minorities cannot buy property in a subdivision and no minorities want to buy property it is "private action." However, as soon as one of them wants to sell property to a minority and the others ask a court to stop the sale because of the private agreement, court action preventing the sale to minority and upholding the "private action" becomes state enforcement and thus "state action."

whether that action is directed by state statute or taken by judicial officer in interpreting the common law. ***Thornhill***, *supra*. The action of state courts in enforcing a substantive common-law rule can equally result in the denial of rights guaranteed by the Fourteenth Amendment, even if the judicial proceeding are in complete accord with the most rigorous conceptions of procedural due process.

The United States Supreme Court in ***American Federation of Labor v. Swing***, 312 U.S. 321 (1941) held that *the action of the State court* in restraining peaceful picketing by enforcing of state common law policy *constitutes state action* of the nature prohibited by the Fourteenth Amendment's guaranties of freedom of speech. The U.S. Supreme Court has unwaveringly held that *judicial action is not immunized from the operation of the Fourteenth Amendment* simply because it interprets and enforces the state's common-law policy. The Fourteenth Amendment does not lose its application simply because the action, which the Court's opinion enforces, is initially defined by the terms of a private agreement, in this case the implied "at-will" agreement. A Court can no more enforce a private covenant purporting to prevent private property sales to people of color than it can restrict the enforcement of the Fourteenth Amendment by putting the State Seal of approval on, and condoning, a private employer's firing of an employee for exercising free speech and association on public issues at a public forum away from the worksite. A state court cannot utilize its authority and state power to prevent working people from peacefully exercising their right of free speech and association.

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(3) THIS COURT'S ENFORCEMENT OF THE ACTION OF A PRIVATE EMPLOYER FIRING AN EMPLOYEE FOR EXERCISING U.S. CONSTITUTIONAL AND STATE CONSTITUTIONAL RIGHTS TO FREE SPEECH AND FREEDOM OF ASSOCIATION CONSTITUTES "STATE ACTION" THAT VIOLATES THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

This Court's affirmative enforcement of the common law "at-will" rule in this case is directed toward a specific class of persons, private sector "at-will" employees, who wish to exercise their respective Constitutional rights of free speech and freedom of association. This Court's holding applies across the board to any and all types of speech by, and individual associations of, private sector "at-will" employees without limitation. Under this Court's holding, no manner of speech or individual association, under either the Idaho Constitution or the U.S. Constitution, is deemed deserving of protection or vindication. It is an intolerable act for a Court to enforce any common-law "rule" over a Constitutionally guaranteed freedom, (see ***Cantwell v. State of Connecticut,*** *supra*), especially when the rights are freedom of speech and association, from which all other Constitutional rights are born and protected. Under this Court's holding, a private sector employer, with full state backing and authority, is free to fire any "at-will" employee for attending any state or local public meeting, attending a 4th of July parade, attending any (or no) church, for signing an initiative petition, for registering to vote, for voting, for reading a book, for reading a particular newspaper, for speaking to a soldier, for not

speaking to a soldier, etc., etc., etc. A simple example: An employer can request a copy of all signatures on an initiative petition filed with the Secretary of State. Upon that employer's review of the petition it is, with the full backing and authority the state through this Court's decision, able to fire any "at-will" employee who signed the petition (or didn't sign the petition) for the simple reason that the employee's well founded opinion is not the same as the "corporate" view of the issue. Because of the overwhelming breadth of this Court's opinion enforcing the "at-will" rule all heretofore fundamental rights of every private "at-will" employee are meaningless. This Court's refusal to protect any private "at-will" employee's right to exercise any speech or association directed at any issues of public concern is judicial action in direct violation of the Fourteenth Amendment. If this Court's holding stands then literally all meaningful discussion on any public issues belongs solely to an exclusive club of a select few. If history has shown us anything it has shown that slaves cannot hope for justice from their masters. The U.S. Supreme Court warned and condemned, in ***Thornhill v. State of Alabama***, *supra*, that under such judicially enforced tyranny the group in power, at any moment in time, would be free to impose sanctions on any peaceful and truthful discussions of any matter of public interest.

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of

> ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."

Certainly neither our Founding Fathers nor our Courts were, or are, so naive as to believe that private employers'/ corporate America's overriding interest is what is "best" for its employees. Under this Court's decision, any private employer by merely claiming that any "at-will" employee's speech/association may result in action inconsistent with its perceived (and secretly pursued) economic interests, is free to effectively and completely silence all speech and prevent all association.[8] If an employer can fire its most community minded and hard working employees, such as Edmondson, for attending a public meeting what is the average (let alone below average) employee to think about his practical ability to form or even have an opinion on anything if he wants to support his family. As the U.S. Supreme Court has unequivocally emphasized, no danger to *any* industrial concern is so serious nor so imminent as to justify sweeping proscriptions of freedom of speech and association enforceable by any Court's order. ***Thornhill***, *supra*.

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8. Indeed one of Shearer's complaints was that Edmondson's wife had contacted a state bureaucrat to obtain information. Where is the line drawn, where does it stop, e.g, son, daughter, brother, cousin, friend down the street?

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This Court's decision has imposed a "gag order" on all free speech and association by not only any privately employed "at-will" person in Idaho but as illustrated by FN7 above, upon literally all Idaho residents. In so doing this Court has violated Edmondson's (and all "at-will" employees') First and Fourteenth Amendments' rights.

Edmondson and his wife were honored by then Governor Batt as Idaho's original Gem Citizens. Idaho's next Gem Citizens will not be community minded persons such as the Edmondsons whose efforts "resulted in several community celebrations, better city lighting and road surfaces, a youth recycling program, a business directory . . . and a new medical center and clinic." (R. Vol. 1, p. 141) Instead the honorees, for fear of losing their jobs, can only be persons who put their employers interests first, above their faith and family. Indeed as reflected by Shearer Lumber's questioning of Edmondson, in his deposition, that is what it expected of Edmondson and its other employees:

> "Q. (By Allen, Shearer attorney) In determining which of the alternatives, then, that you favored in coming to the conclusion that you favored the trust alternative over the other two, *would it be safe to say that in reaching that conclusion what you did not do was place Shearer Lumber's interest as a first priority in making your determination*? (Emphasis added)
>
> A. Excuse me? Could you repeat that, please?

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Q. (By Mr. Allen) So, back to my earlier question. Maybe I can clarify it. I will try anyway. Would it be safe to say that when you were reviewing and studying the alternatives, the three alternatives, that at least *in terms of you deciding what you felt was the best alternative, you were not guided by, as a first priority in any event, whether it was going to be beneficial to Shearer Lumber; that wasn't your first priority in picking a plan, was it?* (Emphasis added)

A. I attended a public meeting as a public.

Q. And in making that determination *did you have Shearer Lumber's interest as sort of the first priority in determining*, you know, which of the three you liked *or was this simply Mr. Edmondson deciding*, you know, what he felt was best based on whatever reason? (Emphasis added)

A. Uhm, I made my decision based on how I would make any decision of any public process.

Q. *So you didn't give Shearer Lumber any, you know, any greater weight merely because you were employed by them in determining what you felt would be the best alternative*? (Emphasis added)

A. I guess I come back to because I feel like that's kind of a leading question. If any kind of public process – I don't necessarily vote, when I go vote for an elected individual, with Shearer Lumber's

> interests as being foremost. It is my responsibility as being a father, a Christian, a citizen of the United States, you know, I guess, Shearer Lumber is not the top priority in my life."

(Edmondson Depo, p. 36, ll. 7-13; p. 38, ll. 10-18; p. 39, ll. 5-21)

The press release on the next Gem Citizen will not name any recipient's name. It will merely state that "A person, has been awarded Idaho's Gem Citizen Award. The announcement will proclaim that the unnamed "person" has *not* attended any meetings, has *not* attempted to form any opinions, has *not* expressed any opinions but has 100% attendance at work.

The fact that the action setting this scenario of events into motion is judicial, and not legislative, does not change the impact of this immense iron curtain-like control of free speech and association by this Court. In reality and practicality, as alluded to by Justice Kidwell in his dissenting opinion, this Court has handed Idaho employers absolute control that is not unlike the "Iron Curtain" first described many years ago by Winston Churchill. Suppression of speech by a court's enforcement of a slave master's commands can not be tolerated. Under this Court's holding, there no longer exists free speech or association in Idaho. How ironic that what many perceive as a state of strong commitment to one individual's rights would be the first to quell free speech and association by judicial enforcement of private industry action. The fact that this Court has acted in its judicial capacity does not shield it from the jealous protection

afforded the First Amendment by the Fourteenth Amendment. Indeed it is this Court's own action that has violated every private "at-will" employee's right to free speech and association. "At-will" is but a general common law rule. Our U.S. and State Constitutions are, or use to be, the cornerstones of our way of life.

The action of State supreme court justices, acting in their official capacities, is regarded as action of the State within the meaning of the Fourteenth Amendment. This undeniable principle has been clearly enunciated as a part of our jurisprudence since at least 1880. ***Commonwealth of Virginia v. Rives***, 100 U.S. 313, 318 (1880); ***Shelley v. Kraemer***, *supra.*

Indeed as the U.S. Supreme Court details in ***Shelley***, action taken by courts, such as that taken by this Court, in enforcing a substantive common-law rule, is state action that may result in the denial of rights guaranteed to individuals by the Fourteenth Amendment. From the very time of the adoption of the Fourteenth Amendment the U.S. Supreme Court has held "that the action of the states to which the Amendment has reference, includes action of state courts and state judicial officials," and "it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." The U.S. Supreme Court has unequivocally held firm "that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. . .when the effect of a state supreme court's action is to deny rights subject to the protection of the Fourteenth

Amendment." ***Shelley**, supra*; ***Cantwell**, supra*. It is the sworn obligation of all judicial officers to enforce Constitutional commands and it is the duty of offending courts, when such an action is brought to its attention, to reconsider the action and rectify the transgression.

This Court's opinion did concede that determining the appropriateness of any governmental restrictions on free speech and association rights of employees requires utilization of the two-step analysis set forth in ***Connick v. Meyers***, 461 U.S. 138 (1983). "Governmental restrictions" are one in the same as "state action taken by state courts and state judicial officers." Courts' orders and opinions are "governmental restrictions." Fundamentally our United States is governed by three branches of government. The decision of this Court, as it stands, represents affirmative state action that enforces a violation of Edmondson's First Amendment rights not only under the equal protection clause of the Fourteenth Amendment of the United States Constitution but also Sections 9 and 10 of Article 1 of the Idaho Constitution.

Justice Shepard's unanimous opinion in ***State v. Ruth***, 102 Idaho 683, 637 P.2d 415, 418 (1981) acknowledges the obvious. "State courts are bound through the operation of the Fourteenth Amendment," citing ***Gideon v. Wainwright***, 372 U.S. 335. In ***Gideon***, the U.S. Supreme Court directs that the Fourteenth Amendment embraces those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." The First Amendment's freedoms of speech and association are of "fundamental nature" (***Johnson v. Sunshine Mining Co.***, 106 Idaho 866, 684 P.2d 268, 271 (1984); ***Thornhill**, supra.*) and immune

from any manner or form of state invasion. This Court's holding that enforces an out-dated form of tyrannical common law interpretation of the "at-will" employment rule in a manner totally inconsistent with the fundamental principles of freedom of speech and association is 'state action' in violation of the Fourteenth Amendment to the U.S. Constitution.

THE COURT'S RECITATION OF FACTS IS ERRONEOUS AND REQUIRES A REHEARING BECAUSE SUCH ERRS NEGATIVELY IMPACT ITS LEGAL ANALYSIS AND VIOLATES EDMONDSON'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

This Court's recitation of the record contains significant errs in its stated facts. Those will not be belabored, one example will suffice.

This Court states at page 7 of its Opinion:

> "Although Shearer at first claimed a lien upon the logs for storage, and then withdrew its claim of lien, there is no allegation of evidence of wrongdoing by Shearer."

This recitation is unquestionably an erroneous statement of the factual record.[9] The factual record does not reflect

9. This statement of fact ignores the lien in the record. (R. Vol. 2, pp. 220-221; and Bennett's testimony at R. Vol. 2, p. 239 @88)

that this lien was ever withdrawn. The record only reveals that John Bennett, after filing his sworn lien affidavit, testified under oath in an irreconcilable and inconsistent manner. This inconsistent sworn testimony by John Bennett, which some might characterize as perjury, is further highlighted by the correspondence of Barry McHugh, who was at that time an Assistant U.S. Attorney for Idaho. He confirmed the existence of an ongoing criminal investigation regarding logs held on Shearer Lumber property. "We agreed that the logs would remain in the same place and in the same condition until such time as the ongoing criminal investigation is completed." (R. Vol. 2, p. 301)

This Court's misstatement of the factual record and its reliance thereon violated Edmondson's Fourteenth Amendment right to due process. Incorrect statements by an appellate court regarding the factual record on appeal on which it bases its decision in an appellate opinion is ground for rehearing. ***Bergman v. Holden***, 857 P.2d 217, 219 (Or.App.1993)

CONCLUSION

It is certainly appropriate for this Court to, just as the legislature, declare the public policy of the State of Idaho. However, it may do so only so long as its declarations are not repugnant to or inconsistent with the United States Constitution. Common law rules such as "at-will" and public policy must be consistent with the provisions of the United States Constitution and the duly ratified Amendments thereto. Without such an inherent restriction the U.S. Constitution would be just another meaningless scrap of

paper. The proclamation of this Court that the Constitutional (U.S. and Idaho) rights of free speech and assembly do not constitute Idaho "public policy" and are not available to at-will employees, cannot go unchallenged nor stand.

Indeed an opinion of this Court (1) finding Idaho public policy to be contrary to the provisions of the U.S. Constitution or Idaho's Constitution or (2) enforcing that public policy in contravention of the respective Constitutions violates not only the Fourteenth Amendment and Idaho Code §73-116, but also the oath sworn to by every Supreme Court Justice in Idaho to "support the Constitution of the United States and the Constitution of the State of Idaho."

Shocking, numbing, incomprehensible are the only words that can be used to describe this Court's decision and apparent willingness to place the vast majority of Idaho's residents in a category of slaves not entitled to fundamental constitutional protections and rights. Slavery was abolished by ratification of the Thirteenth Amendment to the United States Constitution proclaimed on December 18, 1865. Abolishment of slavery is applicable to all states of these United States pursuant to the Fourteenth Amendment to the United States Constitution. Slavery cannot be resurrected by an opinion of this Court.

This Court, by granting absolute arrogant and boundless control of the lives of the vast majority of Idaho employees to their masters has by judicial activism of a heretofore unknown extent reinstated the institution of slavery. The only difference is that this time the parameters of slavery are not based upon any question of the color of a person's skin.

No, this slavery is far more insidious and perhaps more overwhelming. This slavery applies to every "at-will" employee, regardless of race, creed, color or national origin. The standard of this slavery is premised upon a clearly defined directive as set forth by Shearer Lumber to its slaves. Idaho slaves are to form no opinions, nor make any opinions on public issues at the risk of "serious consequences." Such absolutely arrogant power over a person's life and fortune (e.g., work, place of living, and ability to make a living) and liberty (freedom of speech and assembly) is slavery pure and simple. Certainly slave conditions are understood by any Idaho resident to be and constitute "undue restraint or coercion" to employment (Idaho Code §44-2001) and enforcement of such employment conditions are repugnant to and inconsistent with the Idaho and U.S. Constitution (I.C. §73-116.)

This Court's use of its dominate authority to enforce such undue restraint or coercion on employment by specifically authorizing an employer to prevent individual's exercise of Idaho and U.S. Constitutional rights is "state action" of the highest order and the worst conceivable type evil intended to be prohibited by the Fourteenth Amendment to the United States Constitution.

This Court in the collective exercise of its members' solemn individual obligations to uphold the Constitutions of the United States and Idaho, and to respect and enforce Idaho's statutes, is respectfully asked to revisit its decision in this case, review the record before it in a correct factual light, to grant Edmondson a rehearing, acknowledge the fundamental propositions set forth in the Petition and this Brief, and amend its decision in this case accordingly.

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DATED this 20th day of August, 2003.

s/ Starr Kelso
STARR KELSO
Attorney at Law

APPENDIX F — IDAHO STATESMAN EDITORIAL ON SUPREME COURT RULING

Our View: Supreme Court speaks: Shut up and get to work

The Idaho Supreme Court, in a 4-1 ruling on an Elk City case, has taken a huge bite out of the First Amendment right to free speech and free assembly.

The justices ruled that Shearer Lumber Products, a dominant employer in the small community, was within its rights to fire a 22-year employee in good standing for attending public meetings and opposing a forest management project pushed by the company.

The employee, Michael Edmondson, did not speak up at the meeting or express opinions to his fellow employees. But he was fired for what the company called his "continued involvement in activities that are harmful to the long-term interests of Shearer Lumber Products."

The Supreme Court said, in effect, "tough luck."

Justice Jesse Walters, writing the majority opinion, said that since Edmondson was an at-will employee, he was subject to termination "for any reason or for no reason." Neither the method of termination nor the justification was material.

The court's ruling highlights a serious flaw in at-will doctrine. Being an at-will employee should not mean that a person has to give up basic individual rights.

Appendix F

Paul McMasters, a First Amendment ombudsman with the Virginia-based Freedom Forum, brings up some scary and far-reaching implications.

"I'm waiting for the time when an employee is fired for not going to the right church," McMasters said.

His fears are well founded. If the court does not uphold the right to free assembly, then everything else is fair game — including freedom of religion. Under this ruling, an at-will employee conceivably could be fired for attending something as innocent as a Fourth of July parade or being involved with the wrong political party.

"One of the strange ironies is that the First Amendment guarantees the right to free speech, but there is not a First Amendment right to work," McMasters said.

In a small community with few job opportunities, employers potentially could wield a lot of power over employees.

Justice Wayne Kidwell, the only one dissenting, came down on the correct side. Although he supports the premise of "at-will" employment, he recognizes the need to protect First Amendment rights.

Kidwell's dissent is not as strong as it should be. He applies his position only to matters in which speech or activities do not "interfere with the employee's job performance or the business of the employer." Kidwell still leaves the door open wide to the whim of the employer — in effect allowing a company such as Shearer to argue that a logging project is essential to its business.

But Kidwell, unlike the other justices, at least sees how major employers in small towns could use their clout to "squelch the association, speech and debate, so necessary to our system of government."

The Supreme Court is going down a frightful path with this ruling. It's not an example of the kind of "slow erosion" of the First Amendment that McMasters' Freedom Forum is trying to prevent. It's a full-blown assault.